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00-969

(1)

No. 00-

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this espionage case, petitioners Theresa Squillacote and her husband Kurt Stand were subjected to 550 consecutive days of round-the-clock telephonic and physical surveillance, purportedly under the auspices of the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801, *et seq.* In the course of that surveillance, the government intercepted and transcribed several of Squillacote's sessions with her psychotherapists, and later apparently used that information to design an undercover operation tailored, by its explicit terms, to "exploit" her psychiatric vulnerabilities. Pet. App. 115a. The court of appeals concluded that the government had made a sufficient showing to warrant the FISA surveillance without, however, affording defense counsel any opportunity even to examine, much less effectively challenge, the government's submissions in support of FISA authority. The court also sustained the trial court's refusal to hold a hearing regarding whether, and to what extent, the government had made derivative use of privileged psychotherapist-patient communications it obtained during the FISA surveillance. And the court held that, for purposes of the espionage statutes, it makes no difference that the "information" provided by the defendant is wholly in the public domain, so long as it was not the *government itself* that originally disseminated that information to the public.

The following three questions are presented:

1. Whether, in agreement with the Ninth and Tenth Circuits but in conflict with the Second, Third, and Seventh Circuits, the court of appeals correctly held that the government, having intercepted communications protected by a common-law, non-constitutional privilege, is entitled to make derivative use of those communications.

2. Whether, for purposes of the espionage statutes, information that is in the public domain nevertheless "relates to the national defense" because the government did not itself release the information to the public.

3. Whether the court of appeals erred in sustaining the FISA surveillance in this case, without affording defense counsel, pursuant to 50 U.S.C. §§ 1806(f) and 1825(g), an opportunity even to see the applications on the basis of which the surveillance was ordered.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Theresa Marie Squillacote and Kurt Alan Stand respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 221 F.3d 542. The order of the court of appeals denying rehearing (Pet. App. 67a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A timely petition for rehearing was denied on September 8, 2000. Pet. App. 67a-68a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved in this case, 18 U.S.C. §§ 793, 794 and 50 U.S.C. §§ 1801-1829, are set forth in pertinent part in the Appendix. Pet. App. 69a-107a.

STATEMENT

Even for espionage cases, the government's investigation and prosecution of petitioners Theresa Squillacote and Kurt Stand is astonishing. For starters, virtually all of the government's evidence was derived from 550 days of electronic surveillance (and several secret physical searches) conducted under the purported auspices of the Foreign Intelligence Surveillance Act ("FISA"). Yet to this very day, petitioners — although having the statutory right to challenge the basis for the surveillance and searches — have never seen the applications that the government submitted to receive authorization to tap petitioners' phones, bug their bedroom, search their belongings,

download their computer, even intercept their phone conversations while they were staying in a hotel on vacation. But that is not all: The government then capitalized on this unchecked surveillance authority by intercepting several privileged communications between Squillacote (or her husband) and Squillacote's psychotherapists — and (so it appears) thereafter used that privileged information to develop a psychological profile on Squillacote in order to "exploit" her psychiatric infirmities in an undercover operation. And once the case got to trial, the government successfully prevailed upon the district court to instruct the jury that it did not matter, for purposes of the espionage statutes, that the information contained in classified documents passed by Squillacote to an undercover agent was already in the public domain.

The court of appeals sustained the government's position on each of these crucial issues. Without disclosing its reasoning or affording defense counsel an opportunity to see the government's FISA applications, the court held that there was sufficient probable cause to conduct the 550-day surveillance. Without seriously reckoning with a line of conflicting circuit decisions, it held that a breach of the psychotherapist-patient privilege — because it is not constitutionally rooted — does not require the government to show that its evidence was independently derived. And in a flat repudiation of well-settled espionage case law, the court below held that information is "related to the national defense" even if it is widely and readily available to the public. For each of these reasons, the petition for a writ of certiorari should be granted.

1. Petitioners Squillacote and Stand are a married couple who lived with their two young children in the District of Columbia from the early 1980s to October 1997. During the 1980s, Ms. Squillacote worked as an attorney for the National Labor Relations Board, and in 1991 began work as a lawyer at the Department of Defense, where she held a security clearance. See Pet. App. 4a. Stand held a number of jobs in the private

sector throughout the 1980s and in the 1990s (including most recently as a labor union representative (see Pet. App. 110a)); he has never held a position with a security clearance. Court of Appeals Joint Appendix ("JA") 430.

In October 1997, Squillacote and Stand (along with a friend of the couple, James Clark) were arrested for conspiracy to commit espionage. Their arrest was the culmination of an extensive FBI investigation spanning several years. That investigation began some time after the fall of East Germany, when the United States made a cash payment to an undisclosed source in exchange for records that ostensibly came from the former East German intelligence service and contained the names of the two defendants. JA421. After massive surveillance by the FBI unearthed no evidence that defendants had ever passed classified information (JA2089), the government (in approximately January 1996) obtained the first of 20 separate authorizations to conduct clandestine surveillance of defendants' residence pursuant to the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. §§ 1801, *et seq.*, see Pet. App. 7a.

The government conducted electronic surveillance lasting some 550 consecutive days. See Pet. App. 11a. During this electronic surveillance, the government intercepted (and in at least two instances transcribed) telephone conversations between Squillacote (or her husband) and Squillacote's psychotherapists. See Pet. App. 22a; see also Pet. App. 119a-128a. The government also conducted two secret physical searches of defendants' home pursuant to FISA.

2. Despite the voluminous information collected through the FISA wiretaps and physical searches, by the summer of 1996 the government still had no evidence that Squillacote or Stand ever passed classified materials. JA2089; see also Pet. App. 10a. Accordingly, the government set about creating a psychological profile of Squillacote in order to develop a sting

operation against her. Pet. App. 108a-118a. The Behavioral Analysis Program team — a special unit of psychologist(s) and FBI agents that develops psychological assessments of individuals — prepared a profile that described, with remarkable precision, Squillacote's unique psychiatric vulnerabilities. Capitalizing on the government's hundreds of hours of taped surveillance (including, apparently, of Squillacote's psychiatric sessions), the profile described Squillacote as having the "mind of a newly pubescent child" (Pet. App. 113a); reviewed her history of depression and her use of prescribed anti-depressants (Pet App. 111a); identified Squillacote's "narcissistic" and "histrionic" personality (Pet. App. 115a); and noted her "poor impulse control" (Pet App. 114a), constant need for "reassurance, approval, and praise," (Pet. App. 115a n.5), and "excessively emotional behavior." (*Ibid.*) The profile even recognized that, once arrested, Squillacote was a serious risk for suicide. See Pet. App. 113a.

Having catalogued Squillacote's psychological weaknesses, the profile then devised a "false flag" operation that was "designed to exploit her narcissistic and histrionic characteristics." Pet. App. 115a. The profile recommended swift action to exploit Squillacote's "emotional vulnerability" (Pet. App. 112a), and to ensure that the sting operation was launched while Squillacote was still working at the Pentagon (which, as the government learned, she was about to leave). JA2090. Closely adhering to the recommendations set out in the psychological profile, the government launched its false flag operation, luring Squillacote to a meeting, purportedly with an "emissary" of a South African government official to whom she had written a political letter in 1995. See Pet. App. 8a. At their initial encounter, the "emissary" — actually, an undercover agent — appealed to Squillacote's emotions and political sympathies (JA2188-89; 2199, 2204) and insisted — in the face of Squillacote's contrary expressions — that she furnish him something "we didn't have access to[.]" JA630. At the next

meeting, on January 5, 1997, Squillacote brought four classified documents from her workplace. Much if not all of the information contained in those documents was already in the public domain.

3. On February 17, 1998, a grand jury in the Eastern District of Virginia returned a five-count indictment against Squillacote and Stand, together with James Clark. Count 1 charged all three defendants with conspiring to transmit "information relating to the national defense" to East Germany, the Soviet Union, the Russian Federation, and the Republic of South Africa, in violation of 18 U.S.C. § 794(c). Count 3 charged Squillacote and Stand with attempted espionage, in violation of 18 U.S.C. § 794(a). Count 4 charged Squillacote and Stand with obtaining national defense information, in violation of 18 U.S.C. § 793(b). Count 5 charged Squillacote with making false statements, in violation of 18 U.S.C. § 1001. JA82. On June 3, 1998, Clark pleaded guilty to Count 1 (and Count 2 was dismissed). JA352.

Prior to trial, petitioners moved to suppress the evidence obtained pursuant to FISA, contending that the government lacked probable cause that petitioners were "agents of a foreign power" within the meaning of FISA (see 50 U.S.C. § 1801(b)(2)(A)-(D)) at the time that FISA authorization was granted and renewed. See 50 U.S.C. §§ 1805(a)(3), 1824(a)(3). Petitioners also sought disclosure of the government's applications in support of the FISA searches and surveillance, claiming that disclosure was "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. §§ 1806(f), 1825(g). Without disclosing the government's applications — and, accordingly, without permitting a truly adversarial proceeding — the district court denied the motion in all respects, concluding (without explanation) that the government had established probable cause that petitioners were "agents of a foreign power" at all relevant times.

Petitioner Squillacote also moved pre-trial to suppress evidence obtained through the interception of privileged psychotherapist-patient communications, as well as for a pre-trial evidentiary hearing at which the government would shoulder the "heavy burden" of establishing that its evidence had not been derived from such privileged communications. See Pet. App. 23a. The court denied Squillacote's motion, holding that a "taint analysis" was not required because the communications were not protected by "a constitutionally-based privilege." Pet. App. 23a.

4. Petitioners presented two principal lines of defense at trial. First, they contended that they were entrapped by the government's actions — Squillacote directly, and Stand "derivatively." In support of that defense, petitioners presented the testimony of two forensic psychiatrists (one from John Hopkins and the other from the Austen-Riggs Center in Stockbridge, Massachusetts), as well as Squillacote's treating psychiatrist at the time of the sting operation. Taken together, these experts testified that Squillacote suffered from clinical depression and borderline personality disorder, and that the government's sting operation had successfully exploited her unique psychiatric infirmities. JA1014-1583.[1]

Second, petitioners contended that the government did not carry its burden of proving that the four documents Squillacote passed to the undercover agent contained "information relating to the national defense" — an element of the espionage statutes.

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[1] One of the expert psychiatrists testified that Squillacote's personality disorder likely had its roots in the significant childhood trauma that she experienced as a result of numerous painful surgeries and protracted hospitalizations to correct severe physical deformities, including a missing right leg (below the knee), a clubbed left foot, and the absence of fingers on one hand. JA1503-11. The psychiatrist testified that this type of childhood trauma (which often occasions extended separation from parents and isolation) is highly associated with borderline or "Cluster B" personality disorders. JA1155-1156.

See 18 U.S.C. §§ 793 and 794. In light of the failure of the government's witnesses to ascertain whether the same information was present in publicly available sources — and in light of the fact that much (if not all) of the information was *in fact* contained in publicly available sources — petitioners asserted that this critical element of the espionage charges had not been proved. JA1426. Over petitioner's objections, however, the district court instructed the jury "that information is related to the national defense when the government makes efforts to guard the information, regardless of the public's accessibility to the information." JA2398.

After three days of jury deliberations, defendants were convicted on all counts. Petitioner Squillacote was sentenced to a period of incarceration of nearly 22 years, and petitioner Stand was sentenced to more than 17 years in prison.

5. The court of appeals affirmed. See Pet. App. 1a-66a. The court rejected petitioners' claim that the district court should have ordered disclosure of the government's FISA applications, holding that "because the documents submitted by the government were sufficient for the district court to determine the legality of the surveillance, we * * * deny the Appellant's request for disclosure under FISA." Pet. App. 15a. Thus deprived of any meaningful input from the defense, the court of appeals went on to review the government's FISA applications *ex parte* and *in camera*, and concluded — again without explanation — that "each FISA application established probable cause to believe that Squillacote and Stand were agents of a foreign power." Pet. App. 14a.

The court of appeals next held that the district court properly refused to hold a hearing to determine whether the government had derived any of its evidence from petitioners' privileged psychotherapist communications. The court explained that: "[W]e do not believe that suppression of any evidence derived from the privileged conversations would be

proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a.

Finally, the court sustained the district court's instruction on the definition of "information relating to the national defense." Pet. App. 57a. The court did not dispute the fact that the government had never even sought to prove that the "information" at issue was outside the public domain. Indeed, the court recognized that petitioners had "presented evidence of the public availability of information similar to some of the information contained in the documents passed by Squillacote to the undercover agent." Pet. App. 58a. And the court acknowledged that the instruction given by the trial court effectively "prevented the jury from properly considering" this line of defense. Pet. App. 58a. Nevertheless, the court of appeals approved the instruction. In its view, this Court's decision in *Gorin* v. *United States*, 312 U.S. 19 (1941), and Judge Learned Hand's opinion for the Second Circuit in *United States* v. *Heine*, 151 F.2d 813 (1945), make clear that "the central issue is the secrecy of the information, *which is determined by the government's actions.*" Pet. App. 61a (emphasis added). "Under this analysis," the court continued, "the instructions given by the district court in this case were clearly correct, and properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense." *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' HOLDING THAT THE GOVERNMENT IS NOT PROHIBITED FROM MAKING DERIVATIVE USE OF INFORMATION PROTECTED BY NON-CONSTITUTIONAL TESTIMONIAL PRIVILEGES SUCH AS THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

During the government's electronic surveillance of defendants' home under the auspices of FISA, defendant Squillacote was under the care of a psychologist and psychiatrist for severe depression. On several occasions, Squillacote's psychotherapists provided consultation and treatment over the telephone to Squillacote, both directly and indirectly (through her husband). As noted above, on at least eight occasions those conversations were intercepted by the government, and on two occasions they were transcribed and reviewed by government agents. See JA2173-80; Pet. App. 119a-128a. The transcribed conversations included highly sensitive, personal information about Squillacote's mental condition and her family's medical history, including Squillacote's mother's tendency toward depression and Squillacote's recent suicidal ideations. See JA2173-80. Some of the information conveyed by Squillacote (and her husband) to Squillacote's psychotherapists found its way into the Behavioral Analysis Program profile ("BAP") — which, as explained above, was the psychological blueprint for the government's undercover operation against Squillacote. Pet. App. 111a, 119a-128a. In addition, a government agent who listened to Squillacote's (and her husband's) privileged conversations with Squillacote's psychotherapists completed a diagnostic questionnaire that was relied upon in preparing the BAP. JA356-357 (Declaration of Thomas M. Chemlovski).

Nevertheless, the court of appeals held that Squillacote was not entitled to a hearing at which the government must bear the "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." *United States* v. *Harris*, 973 F.2d 333, 336 (4th Cir. 1992) (citing *Kastigar* v. *United States*, 406 U.S. 441 (1972)). The court agreed that the intercepted conversations were privileged; but it held that "because the privilege here at issue is not a constitutional one, the district court properly refused to suppress any evidence arguably derived from the government's interception of" Squillacote's privileged communications with her psychotherapists. Pet. App. 27a.

A. The Circuits Are Divided Over Whether The Government Is Permitted To Make Derivative Use Of Information Protected By Non-Constitutional Testimonial Privileges

The Fourth Circuit's holding deepens an already pervasive conflict in the courts of appeal over whether the government may make derivative use of information it obtains in violation of a non-constitutional, common-law testimonial privilege.

Like the Fourth Circuit, the Ninth and Tenth Circuits permit the derivative use of information protected by a common-law testimonial privilege. See *Nickel* v. *Hannigan*, 97 F.3d 403, 408-409 (10th Cir. 1996) (declining to apply "the fruit of the poisonous tree" doctrine to the possible breach of attorney-client privilege, and holding that "any breach of [defendant's] attorney-client privilege that [his lawyer] may have committed had no effect on the admissibility" of evidence purportedly derived from privileged information); *United States* v. *Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir. 1980) ("[b]ecause we reject * * * Lefkowitz's argument that the marital privileges are somehow constitutionally grounded in, among other locations, the Fourth Amendment, we doubt that a secondary source of information obtained through information

protected by the confidential marital communications privilege would in any way be 'tainted'"); *United States* v. *Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) ("no court has ever applied ['the fruits of the poisonous tree'] theory to any evidentiary privilege" and adding that Ninth Circuit "would not be the first to do so").

By contrast, the Second, Third, and Seventh Circuits have held that the government is prohibited from making both direct and derivative use of information protected by testimonial evidentiary privileges. See *In re Grand Jury*, 111 F.3d 1083, 1088 (3d Cir. 1997) (because the government promised that neither witness's testimony nor its fruits would be used to prosecute witness's husband, the Third Circuit affirmed the district court's contempt order; held, such "use-fruits" immunity ensured that witness's testimony "will not have adverse legal consequences to her spouse," and thus "the purpose of the privilege is in no way undermined"); *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir. 1982) (where the government declined to grant a witness derivative use immunity protecting against the use of the witness's testimony against the spouse, trial court correctly refused to compel testimony over a claim of adverse spousal testimony privilege); *United States* v. *Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989) (ordering the district court to hold "an evidentiary hearing to determine whether the government's case was in any respect derived from a violation of the attorney-client privilege"); *In Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985) (sustaining contempt order against a witness who refused to provide grand jury testimony where the government promised to make no direct or indirect use of her testimony in any criminal investigation of her husband; held, the "'*use-fruits' immunity granted by the government to [the witness] is fully co-extensive with the scope of the privilege against adverse*

spousal testimony");[2] *United States* v. *White*, 970 F.2d 328 (7th Cir. 1992) (where government is complicit in obtaining information protected by the common law attorney-client privilege (*i.e.*, attorney-client communications that occur prior to the attachment of a defendant's Sixth Amendment right to counsel), court should consider "whether evidence that the government introduced to convict" defendants "stem[med] directly or indirectly" from privileged information).[3]

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[2] The Fourth Circuit attempted to distinguish the decisions from the Second and Third Circuits involving the adverse spousal testimony privilege on the ground that those cases involved the "government's effort to compel a witness to testify over the witness's claim of privilege." Pet. App. 24a. But that is truly a distinction without a difference. Each of those cases plainly held that a right against *derivative use* was part and parcel of the underlying common-law privilege. That is why it would not have been sufficient, in *Ford*, for example, for the government to promise merely not to *directly* use the spouse's testimony. Rather, the court held that "'use-fruits' immunity is * * * is fully co-extensive" with the testimonial privilege. *Ford*, 756 F.2d at 255.

[3] Not surprisingly, the district courts are also in disarray on the question whether the violation of a common-law non-constitutional privilege requires a hearing to ensure that the government's evidence at trial has not been derived from privileged material. Compare *United States* v. *Longo*, 70 F. Supp.2d 225, 264 (W.D.N.Y. 1999) (in case involving alleged breach of attorney-client privilege by government before indictment, court held that "[w]here a violation of the attorney-client privilege is demonstrated, the remedy for such a violation is the suppression of evidence derived from the privileged communication[]"); *United States* v. *Weissman*, No. 52 94 Cr. 760 (CSH), 1996 WL 751386, at *8 (S.D.N.Y. Dec. 26, 1996) (after government mistakenly received interview notes protected by attorney-client privilege during its investigation of defendant, government was required to satisfy "heavy burden" that its evidence against defendant was "derived from legitimate independent sources of proof, rather than from the direct or indirect use of privileged information"); *United States* v. *Boffa*, 513 F. Supp. 517, 522-523 (D. Del. 1981) (although "there are no constitutional principles which are in need of vindication" since "the alleged governmental intrusion into the defendants' attorney-client relationships * * * occurred long before * * * their Sixth Amendment right to assistance of counsel had attached," if defendant can establish breach of common-law attorney-client privilege, government would be required to establish that "its proof at trial had an

B. Whether The Government Is Prohibited From Making Derivative Use Of Information Protected By A Testimonial Common Law Privilege — Such As The Psychotherapist-Patient Privilege — Is An Important And Recurring Federal Question

Whether the government may electronically intercept (or otherwise acquire) the contents of privileged psychotherapist-patient communications and then use the information contained in those conversations to build a criminal prosecution is a question of surpassing importance in the development of federal criminal law. The very premise of common-law privileges is that frank and candid communications (whether with a psychiatrist, a lawyer, or a spouse) "depend[] upon an atmosphere of confidence and trust" (*Jaffee* v. *Redmond*, 518 U.S. 1, 9 (1996)). The question whether the protection against derivative use is limited only to information shielded from disclosure by a "constitutionally-based privilege" has profound implications for a broad range of citizens' everyday conduct.

Law enforcement, too, has the right to expect (and the need for) clear guidance from the Court concerning the constraints (if any) on its ability to make indirect use of privileged communications — as the government apparently did in this case. Where it is clear to law enforcement officers that they are not permitted to derive evidence from privileged information — such as after Fifth Amendment immunity has been conferred on a witness who is under investigation — they have become quite accustomed to taking appropriate steps to segregate the privileged information from the remainder of the investigation to safeguard against any impermissible taint. See, *e.g.*, *United States* v. *Lacey*, 86 F.3d 956, 972 (10th Cir. 1996) (no *Kastigar*

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independent origin, untainted" by the privileged information) with *SEC* v. *OKC Corp.*, 474 F. Supp. 1031, 1039 (N.D. Tex. 1979) (rejecting application of "fruit of the poisonous tree doctrine" to evidence derived from information protected by attorney-client privilege).

hearing necessary because government "erect[ed] a so-called 'Chinese Wall' between those persons exposed to [defendant's] grand jury testimony and those who were not."). Indeed, certain components of the government have established "Chinese Wall" and "taint team" procedures to deal with situations in which even common-law privileged information has been intercepted. See, *e.g.*, *United States* v. *Neill*, 952 F. Supp. 834, 840-841 (D.D.C. 1997) ("taint team" established to review materials protected by attorney-client privilege); *United States* v. *Burnett*, No. 95-CR-272 (JG), 1996 WL 1057161, at *6 n.6 (E.D.N.Y. March 11, 1996) ("Chinese Wall" erected to review attorney-client privileged material).

By contrast, in other cases involving the government's acquisition of privileged material (including this one), little has been done by the government to minimize the risk that the privileged material might taint the development of evidence to be used in the prosecution. See, *e.g.*, *Weissman*, 1996 WL 751386, at *12 n.5 (government did not erect "Chinese Wall" to protect against possible taint from attorney-client privileged information). The Court should take this occasion to provide a uniform answer to this important and recurring area of federal criminal law — by making clear that derivative use of even common-law privileged material is forbidden.

II. THE COURT OF APPEALS' CONSTRUCTION OF THE TERM "RELATING TO THE NATIONAL DEFENSE" IS INCONSISTENT WITH THIS COURT'S CASE LAW AND WORKS AN UNJUSTIFIED EXPANSION OF THE REACH OF THE ESPIONAGE STATUTES

To prove all but the false statement count in this case, the government was required to establish beyond a reasonable doubt that the defendants obtained, attempted to transmit, or conspired to transmit information "relat[ed] to the national defense." See 18 U.S.C. §§ 793(b), 794(a) and (c). The very

heart of the defense case on this essential element was that the government had failed to prove that the information on which the government relied was *not lawfully available in the public domain*. To this end, petitioners established that the government had not conducted any inquiry to determine if the information was available to the public before January 5, 1997 (the date of dissemination). And, as if it were their burden of proof (not the government's), petitioners also showed the jury an array of publicly available documents that contained precisely the same information that the government relied upon to prove the espionage-related charges.

Remarkably, the district court stripped petitioners of their ability to present this defense by instructing the jury, in effect, that it was no defense at all. The jury was told that, to establish the element of relating to the national defense, the government need prove only "two things":

> . . . First, it must prove that the disclosure of the material would be damaging to the United States or might be useful to an enemy of the United States.
>
> And second, it must prove that the material is closely held by the United States Government.

JA1435; Pet. App. 58a. Over strenuous objection, the court declined to instruct the jury that the government also had to prove that the information was not lawfully available to the general public. The court of appeals sustained the district court's instruction, holding that this Court's decision in *Gorin* v. *United States*, *supra*, and Judge Learned Hand's opinion in *United States* v. *Heine*, *supra*, make clear that "the central issue is the secrecy of the information, *which is determined by the government's actions.*" Pet. App. 61a (emphasis added).

In fact, however, *Gorin* and *Heine* provide cold comfort for the court of appeals' unprecedented construction of the term "relating to the national defense." By holding, in substance,

that information — no matter how freely available to the public — nevertheless relates to the national defense unless *the government* releases it, the court below wrenched the phrase from its statutory context and worked an unjustified expansion of the espionage statutes. Further review is plainly warranted.

A. *Gorin* and *Heine* Do Not Support — If Anything, They Contradict — The Court of Appeals' Construction

In *Gorin*, this Court held that the categories of "information" covered by the Espionage Act must be construed in the context of "[t]he obvious delimiting words in the statute," which required the government to prove "intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation." 312 U.S. at 27-28 (internal quotation omitted). This language, the Court reasoned, "requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established." *Id.* at 28. And, coming to the heart of the matter, the Court explained:

> Where there is no occasion for secrecy, *as* with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.

Ibid. (emphasis added).

"When there is no occasion for secrecy," the Court held, the "information" at issue cannot give rise to espionage. True enough, when the government itself has released the information to the public, there is no longer any "occasion for secrecy." But the Court quite plainly did *not* hold that it is *only* when the government itself releases the information that "there is no occasion for secrecy." That is why the Court used the critical, if diminutive, word "as" (and why we highlighted the

term in the previous quotation). As the Court made clear, the central question is whether there is an "occasion for secrecy"; if there is not — either because the government has relinquished the information or because the information has, by some other means, become widely disseminated to the public — there simply cannot be the requisite inference of scienter, and thus the information does not "relate" to the national defense.

The Second Circuit's decision in *United States* v. *Heine*, 151 F.2d 813 (1945), reinforces the point. The defendant in that case culled all of the information he sent abroad from publicly available sources, and he contended on appeal that such information cannot give rise to an espionage prosecution. The court of appeals agreed. The court did, to be sure, observe that the government had "never thought it necessary to withhold" the information at issue. 151 F.2d at 816. But, as in *Gorin*, there was no intimation that it is *only* the government's decision-making that distinguishes information that does, and does not, relate to the national defense. If anything, the case suggests quite the opposite. In explaining why Heine's efforts to arrange the material in a useful manner did not render him culpable under the statute, the court of appeals, relying on *Gorin*, explained that "when the information has once been made public, and has thus become available *in one way or another to any foreign government*, the 'advantage' intended by the section cannot reside in facilitating its use by condensing and arranging it." *Id.* at 817 (emphasis added).

The court below read *Gorin* and *Heine* to mean that "the central issue is the secrecy of the information, which is determined by the government's actions." Pet. App. 61a. That is half right. "The central issue" is, indeed, "the secrecy of the information." But neither *Gorin* nor *Heine* can be fairly read to hold that *only* "the government's actions" can "determine" whether information is secret. If anything, the cases suggest exactly the opposite.

B. The Court of Appeals' Decision Works A Radical Change In Well-Settled Espionage Law

Until this case, no one would have guessed that the public availability of information was irrelevant to whether it "relates to the national defense." Indeed, the standard text on federal jury instructions — 1 Sand, Siefert, Loughlin & Reiss, MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) ¶ 29.091, at 29-5 (1997) — states in relevant part:

> Only information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section.

See also JA1645 (Defendants' Alternate Jury Instruction). Even the Fourth Circuit had consistently taken that view. See *United States* v. *Morison*, 844 F.2d 1057, 1071-1072 (4th Cir. 1988) ("the government must prove that the documents * * * are closely held in that they have not been made public *and* are not available to the general public") (emphasis added); *United States* v. *Truong*, 629 F.2d 908, 918, n.9 (4th Cir. 1980) (approving instruction that informed the jury "that the defendants would not be guilty of transmitting national defense information if the information were available in the public domain" — that is to say, the district court "specifically instructed the jury that transmission of publicly available information did not fall within the statutory prohibitions").[4]

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[4] See also, *e.g.*, 70 AM. JUR. 2D SEDITION, SUBVERSIVE ACTIVITIES, AND TREASON § 35 (1987) ("One cannot be convicted of violating the Espionage Act if the information transmitted was made available to the public by the government, *or* if the information was available to everyone from lawfully accessible sources, *or* if the government did not attempt to restrict its dissemination.") (emphasis added); *id.* § 43 ("The jury should be specifically instructed that the transmission of publicly available information does not fall within the statutory prohibitions.") (citing *Truong*); *United States* v. *Richardson*, 33 M.J. 127, 129 (C.M.A. 1991) (noting that, under the espionage statute governing military members, which "tracks the language

So well-established was this rule that **both** the government and the defendants requested that the jury be instructed that "[o]nly information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section." JA1645 (Defendants' Alternative Jury Instruction); see JA1483 (Government's Proposed Jury Instruction No. 10) ("[The Government must prove that the material is closely held in that it has not been made public by the United States Government *and* is not available to the general public.") (emphasis added). At trial, however, petitioners were able to show that, while the documents in question had not been declassified, information contained within them was lawfully available to the general public from other sources, such as *Jane's Intelligence Review* and *Jane's International Defense Review*. JA 794-815, 872-965, 1648-1650, Defense Exhibits ("DE") 205-215. This showing caused the government to withdraw its proposed instruction and replace it with the charge ultimately given by the district court. JA1534 (Government's Revised Jury Instruction No. 10).[5]

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of 18 U.S.C. § 794(a)," a defendant may be convicted only if he or she transferred "information that is not lawfully accessible to the public").

[5] Notably, the government has, in other forums, embraced petitioners' view of the law. See Hearings on the Peter Lee Case Before the Subcomm. on Administrative Oversight and The Courts of the Senate Committee on the Judiciary, 106th Cong. (2000), available in LEXIS, FDCH Political Transcription, April 12, 2000 ("Hearings"). In explaining his concerns about the viability of a prosecution under 18 U.S.C. § 794, Department of Justice prosecutor Michael Liebman (one of the prosecutors in this case) explained to a subcommittee of the Senate Judiciary Committee that "even though the Department of Defense may in good faith and in full propriety classify a document or classify certain documents, if in fact, the information is not significant, *if in fact, there is substantially the same information available to the public, then it is not national defense information and therefore not a violation of those provisions*." Hearings at 28 (emphasis added).

Under the court of appeals' construction, any defense information — no matter how widely and readily available — "relates" to the national defense unless and until the government officially releases it. Not only does this violate the baseline presumption that criminal statutes be narrowly construed (see *Cleveland* v. *United States*, ___ U.S. ___, 121 S. Ct. 365, 373 (2000)), but it also works a troubling and unjustified expansion of the espionage law in particular. As this Court explained in *Gorin*, the espionage statutes must not be construed to "force[] anyone, at his peril, to speculate as to whether certain actions violated the statute." 312 U.S. at 26. But the court below has done just that. The most widely available information may now give rise to an espionage prosecution, so long as the government was not the original disseminator. That is a considerable risk — and raises profound First Amendment concerns — since it will not always be easy to tell the original source of a leak, and since the government does not invariably acknowledge its own role in leaking information. *Cf. Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe [a] protected freedom").

The court of appeals sought to justify its newly-minted construction of the espionage statutes by explaining that information from non-government sources can *never* be equivalent to the information contained in a government document because the former lacks the authoritativeness inherent in classified government material. See Pet. App. 63a. That is doubtless true in many cases. By the same token, however, there are certainly occasions (as in this case) in which the *fact* that a piece of information is in a government document carries no special significance and thus the public disclosure of that information by non-governmental sources can be said to constitute the same "information." For example, the government would be hard-pressed to persuade a jury that a

classified report of an arms transfer between two foreign nations carries some special imprimatur that makes it more valuable than the public announcement by the foreign governments themselves that the arms deal has been consummated. And such classified information becomes even more obsolete after public reports of the actual delivery of those weapons systems.[6] The bottom line is that the question of whether any particular piece of information in a classified document provides "information" above and beyond the content itself is an intensely fact-intensive one for the jury to decide. Here, the jury was not even given the opportunity to consider the issue. By sustaining the jury instructions in this case — which made *absolutely no mention* of the fact "that transmission of publicly available information d[oes] not fall within the statutory prohibitions," *Truong*, 629 F.2d at 918 n.9 — the court below held that there is *always*, as a matter of law, an imprimatur associated with government documents.

III. THIS COURT SHOULD REVIEW THE GOVERNMENT'S PURPORTED SHOWING OF PROBABLE CAUSE TO CONDUCT FISA SURVEILLANCE, AS WELL AS CLARIFY WHEN, IF EVER, DEFENSE COUNSEL SHOULD BE PERMITTED TO EXAMINE THE APPLICATIONS THAT SUPPOSEDLY SET FORTH THE REQUIRED PROBABLE CAUSE

Petitioners were the targets of 550 consecutive days of electronic surveillance and physical searches authorized by federal judges under FISA. This blanket surveillance — which included microphones embedded in petitioners' home and bedroom, telephone intercepts, and at least three clandestine

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[6] This was precisely the type of classified and publicly available information at issue in this case. See, *e.g.*, Government Trial Exhibit ("GE") 4 [classified document]; Defendants' Trial Exhibit [publicly available materials].

physical intrusions into petitioners' residence — was authorized and extended on at least 20 different occasions during the 550 day period. See Pet. App. 11a, 14a. Under FISA, a judge of the Foreign Intelligence Surveillance Court ("FISC") — consisting of seven district court judges appointed by the Chief Justice — could have authorized each surveillance only upon a finding of "probable cause" that petitioners were, at the time of each application, "agents of a foreign power" or knowingly conspiring with or aiding and abetting an "agent of a foreign power." 50 U.S.C. § 1801(b)(2)(A), (D).[7]

The court of appeals sustained the "probable cause" finding (Pet. App. 15a), after determining — based on its own *ex parte* and *in camera* review of the FISA materials — that FISA's probable cause standard was met. Pet. App. 14a. It also sustained the trial court's refusal to allow defense counsel to examine the applications that ostensibly showed the requisite probable cause. See Pet. App. 15a.

We believe both holdings are deeply mistaken and ask the Court to review them.[8]

1. With respect to the refusal to let defense counsel even examine the government's showing of probable cause, that is, to say the least, a striking anomaly in federal criminal law. In general, a warrant must issue before the government can conduct either an electronic surveillance or physical search of a residence. U.S. CONST., AMEND. IV; 18 U.S.C. §§ 2511, 2518, 2236; *United States* v. *Karo*, 468 U.S. 705, 714-15

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[7] FISA permits a FISC judge to order surveillance only upon a finding "on the basis of the facts submitted by the [government] applicant [that] there is probable cause to believe that (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . ." 50 U.S.C. § 1805(a)(3); *see also* 50 U.S.C. § 1824(a)(3) (addressing physical searches).

[8] Petitioners have requested the Department of Justice to forward the government's FISA applications to the Court. Pet. App. 129a-130a.

(1984). Indeed, absent unusual circumstances, physical searches of a private home are generally to be announced and in the presence of the owner. *Richards* v. *Wisconsin*, 520 U.S. 385, 389 (1997). Moreover, in virtually all other warrant circumstances, the government's application for a warrant is either a matter of public record, or at least must be disclosed to provide the defendant with an opportunity to suppress any fruits of the surveillance. See, *e.g.*, 18 U.S.C. § 2518(9) (Title III) and FED. R. CRIM. P. 41(g). Under FISA, however, the underlying FISA applications remain presumptively secret, only to be disclosed where "necessary to make an accurate determination of the legality" of the search or surveillance. 50 U.S.C. § 1806(f), 1825(g). There are no reported cases in which any Court has authorized such a disclosure.[9]

In this case, the courts denied petitioners access to each of the FISA applications and affidavits (see Pet. App. 15a), forcing petitioners to mount a virtually blind "probable cause" challenge to those surveillance and search orders. As a result, the only judicial evaluations of the legality of the 20 FISA orders occurred *in camera* and *ex parte*, without any adversarial proceeding.[10] The courts did not articulate the bases for their findings that no disclosure was "necessary to make an accurate

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[9] It appears that only one circuit court has addressed the due process consequences of FISA's non-disclosure provision. See *United States* v. *Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987) (finding no due process violation). Other courts have simply applied the *in camera* and *ex parte* review procedures without addressing any due process objections. See, *e.g.*, *United States* v. *Johnson*, 952 F.2d 565, 571-72 (1st Cir. 1991); *United States* v. *Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987) (denying request for disclosure of FISA application).

[10] In enacting FISA, Congress intended that the issue of probable cause be guided by "the same requisite elements which govern such determinations in the traditional criminal context." S. Rep. No. 95-604, at 47 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3948-49. In *Ornelas* v. *United States*, this Court held that "as a general matter determinations of . . . probable cause should be reviewed *de novo*." 517 U.S. 690, 699 (1996).

determination of the legality" of the surveillance, as required under the statute.

There was no legitimate justification for the courts to undercut petitioners' ability to mount a probable cause challenge to the massive FISA surveillance deployed against them by denying them access to the FISA applications and affidavits. FISA specifically provides that targets of FISA surveillance may move to suppress "evidence obtained or derived from such * * * surveillance," on the grounds that either the evidence was "unlawfully acquired" or that "the surveillance was not made in conformity with an order of authorization or approval." 50 U.S.C. §§ 1806(e) and 1825(f). Furthermore, while FISA permits the court to deny disclosure where the Attorney General certifies that "disclosure or an adversary hearing would harm the national security of the United States" (50 U.S.C. §§ 1806(f), 1825(g)), FISA's legislative history indicates that Congress intended that disclosure would "typically" be given where the court's initial review of the application, order and fruits of surveillance indicates that the question of legality may be complicated by factors such as "'indications of possible misrepresentation of fact.'" *United States* v. *Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) (quoting S. Rep. 95-701, at 64 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 3960).

Here, petitioners adduced substantial evidence that the government could not have met its probable cause showing in some or all of its FISA surveillance applications, raising serious questions regarding the lawfulness of the surveillance and the accuracy of the representations the government made to the FISA judges. Yet, the courts made their probable cause evaluations in a vacuum, using secret evidence never revealed to the petitioners, despite their *prima facie* probable cause challenge. This Court has never examined the lawfulness of this FISA provision, which permits sweeping invasions of privacy against United States citizens and then permits the

government and the courts to deny defendants access to the applications and affidavits that purported to establish the probable cause basis in the first place. Without adequate guidelines for reviewing courts to follow when making their *de novo* probable cause determinations, defendants cannot possibly bring meaningful probable cause challenges.

2. This Court also should examine the sufficiency of the probable cause showings in this case. To be sure, in the usual case, the sufficiency of probable cause is a fact-bound question unworthy of the Court's review. But this hardly is "the usual case." Absent the Court's review, coupled with a truly adversarial proceeding, petitioners will never have a full and fair chance to contest the merits of this extraordinary surveillance.

FISA does not permit secret surveillance based on a *past* relationship with a foreign power, but instead authorizes surveillance only where there is probable cause to believe the target is in an *ongoing* agency relationship with a foreign power. 50 U.S.C. §§ 1805(a)(3), 1801(b).[11] In this case, the government has contended that surveillance was justified under FISA's "aiding and abetting" or "conspiracy" provision (50 U.S.C. § 1801(b)(2)(D)), yet this provision also requires a knowing, *present* agency relationship with a foreign power.[12]

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[11] To be an "agent of a foreign power" requires, at a minimum, the knowing performance of activities for or on behalf of a foreign power sufficient to meet traditional standards of agency law. *See* S. Rep. 95-604, at 22, *reprinted in* 1978 U.S.C.C.A.N. at 3923.

[12] In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949). Likewise, "in a conspiracy two different types of intent are generally required — the basic intent to agree * * * and the more traditional intent to effectuate the object of the conspiracy." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 n.20 (1978). Thus, under

The Russian Federation is the only "foreign power" in this case with which petitioners could have had an "agency" relationship during the 550 days of FISA surveillance.[13]

Accordingly, each of the 20 FISA applications has to be evaluated, *de novo*, to determine whether there is probable cause to believe that petitioners were, at the time of each application (see *Sgro* v. *United States*, 287 U.S. 206, 210 (1932)), either an "agent" of the Russian Federation, or knowingly aiding and abetting (or conspiring with) an agent of the Russian Federation. In its opinion, the court of appeals held: "We have reviewed *de novo* the relevant materials, and likewise concluded that each FISA application established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted." Pet. App. 14a.

Section 1801(b)(2)(D), the government was required to establish in its FISA applications that petitioners knowingly were conspiring or assisting an "agent or a foreign power" with the specific intent to engage in "clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States." See 50 U.S.C. § 1801(b)(2)(A).

[13] The indictment identified only four possible "foreign powers": East Germany, the Soviet Union, South Africa, and the Russian Federation. See JA86. East Germany and the Soviet Union, of course, ceased to exist in 1990, well before the FISA surveillance at issue here, and any prior agency relationship petitioners may have had with these defunct nations could not have satisfied FISA's strict surveillance mandates in 1996 and 1997. The government has never argued that petitioners were in any agency relationship with South Africa at the time the FISA surveillance commenced. Indeed, the predicate for the "false flag" operation — initiated during the FISA surveillance — was for a U.S. government agent to pose as a South African intelligence officer seeking to *initiate* an agency relationship with petitioners on behalf of that nation. See Pet. App. 115a-116a. That leaves the Russian Federation as the only possible "foreign power" for which petitioners could have been "agents" during the FISA surveillance; but there was no probable cause to believe such a relationship with Russia actually existed.

Yet, the court of appeals declined to provide any details to support its conclusion, stating it was relying *solely* on its *ex parte* and *in camera* review of the FISA applications and finding no error in the exclusion of petitioners from this secret examination. Pet. App. 14a-15a.

In making its own *de novo* assessment of the FISA applications, see *Ornelas* v. *United States*, 517 U.S. at 698 (probable cause determinations should be reviewed *de novo*), this Court should consider the following issues, among others, with respect to the initial FISA application in early 1996:

First, did the government inform the FISC judge that it was proceeding under FISA's "aiding and abetting" and "conspiring" provision and did it show that petitioners — as the target of the surveillance — were *knowingly* conspiring with or *knowingly* aiding and abetting or conspiring with an "agent of a foreign power" who had an *existing* agency relationship with a foreign power?

Second, if the government claimed that petitioners were "aiding and abetting" or "conspiring" with Lothar Ziemer — their supposed former East German "handler" — did the government claim that Ziemer had an ongoing agency relationship with the Russian Federation, and if so, could that claim have supported a probable cause finding in 1996 given that (a) Ziemer had been arrested in Germany in 1992 and convicted in 1995 for intelligence gathering activities,[14] and (b) the FBI had interviewed him and offered him immunity from prosecution in 1992?

And *third*, even if the government adduced evidence sufficient to establish that Ziemer was acting as an agent of Russia in 1996, did the government adduce evidence sufficient

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[14] It defies common sense to believe that the Russian Federation or any other foreign power would entrust Ziemer to perform intelligence activities on its behalf *after* his public arrest and conviction.

to establish probable cause that petitioners knew of that relationship and conspired with or *knowingly* were assisting Ziemer in his agency relationship with Russia?[15]

The same probable cause standard applies to each of the 19 subsequent FISA applications, whether they were for renewals of the initial electronic surveillance applications or whether they were for the three physical searches of petitioners' domicile in Washington, D.C.[16] With each subsequent application, the government should have brought to the attention of the FISC any new evidence that would have undercut the probable cause to believe that the petitioners were still agents of any foreign power or knowingly conspiring with or aiding and abetting agents of any foreign power. From the limited evidence made available to petitioners through discovery, several factors would have removed any probable cause during the course of the FISA surveillance:

For instance, the government learned during their FISA surveillance that Squillacote had been engaged in a romantic affair with Ziemer and that their relationship *ended* in May 1996, See Pet. App. 111a, leaving her sobbing and depressed. To the extent that the government previously had relied on some ongoing connection between petitioners and Ziemer to justify earlier surveillance orders, the clear break-up between Squillacote and Ziemer in the early months of the FISA

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[15] The mere fact that petitioners had some continuing association with Ziemer, a former East German intelligence officer, is not sufficient to establish agency, conspiracy or aiding and abetting under FISA. Indeed, Congress specifically stated that secret surveillance under FISA is not justified based on "mere continued association and consultation with" agents of a foreign power. S. Rep. No. 95-701, at 28 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3973, 3997.

[16] FISA authorizes surveillance against targets that are not themselves "foreign powers" only for periods of 90 days or less, and physical searches against such targets only for periods of 45 days or less. 50 U.S.C. §§ 1805(d), 1824(c).

surveillance was powerful evidence that no agency or other relationship existed after that date.

Similarly, when he government launched its "false flag" operation against Squillacote in mid-1996, it sought to capitalize on the fact that she had "end[ed] her affair with Ziemer" and thus was "emotional[ly] vulnerab[le]" to an approach by someone posing to be a member of the South African intelligence agency. Pet. App. 12a. Thus, the government sought and obtained Justice Department approval to launch its false flag operation based on the government's fervent belief that Squillacote (and her husband) *were not* at that time acting as agents of a foreign power nor were they knowingly assisting or conspiring with any such agent, but craved to embark on such a relationship with a willing patron. This demonstrates that the government knew, no later than the summer of 1996 (early on in the FISA surveillance), that petitioners were not acting as an agent of any foreign power. At a minimum, it certainly tends to negate probable cause that petitioners were acting as "agents of a foreign power." Had this information been properly disclosed to the FISC judges during that period, authorization could not have been granted.

Some or all of the 20 FISA orders, therefore, were unlawfully issued and the evidence gathered as a result of those orders should have been suppressed. Petitioners urge the Court to grant certiorari and to articulate and apply the appropriate "probable cause" standard required by due process and provided for under FISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

THERESA MARIE SQUILLACOTE
AND KURT ALAN STAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-4088

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THERESA MARIE SQUILLACOTE, a/k/a Tina, a/k/a Mary Teresa Miller, a/k/a The Swan, a/k/a Margaret, a/k/a Margit, a/k/a Margret, a/k/a Margrit, a/k/a Lisa Martin, a/k/a Resi, a/k/a Anne,
Defendant-Appellant.

No. 99-4089

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KURT ALAN STAND, a/k/a Ken, a/k/a Junior, a/k/a Alan David Jackson
Defendant-Appellant

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, Chief District Judge.

(CR-98-61)
Argued: March 3, 2000
Decided: August 11, 2000

Before LUTTIG and TRAXLER, Circuit Judges, and Jackson L. KISER, Senior United States District Judge for the Western District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Traxler wrote the opinion, in which Judge Luttig and Senior Judge Kiser joined.

COUNSEL

ARGUED: Lawrence S. Robbins, MAYER, BROWN & PLATT, Washington, D.C., for Appellant Squillacote; Richard Alan Sauber, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, Washington, D.C., for Appellant Stand. Randy I. Bellows, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia; Michael Charles Liebman, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Lee H. Rubin, Edward S. Lee, MAYER, BROWN & PLATT, Washington, D.C., for Appellant Squillacote; Douglas W. Baruch, David B. Wiseman, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, Washington, D.C., for Appellant Stand. Helen F. Fahey, United States Attorney, Vincent L. Gambale, Assistant United States Attorney, Robert A. Spencer, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

OPINION

TRAXLER, Circuit Judge:

Appellants Theresa Squillacote and her husband Kurt Stand appeal from their convictions on various espionage-related charges. We affirm.

I.

Viewed in the light most favorable to the government, the evidence presented at trial established the following. Kurt Stand's parents fled to the United States from Germany during Hitler's reign. After the war, his family maintained contact with friends in the German Democratic Republic ("East Germany"). When Stand was approximately 18, his father introduced him to Lothar Ziemer, an officer with the Ministerium fur Staatssicherheit ("MfS"), East Germany's intelligence agency. The "HVA" was the foreign intelligence arm of the MfS, and Ziemer was in charge of Section 3 of the HVA's Department XI. The "primary mission" of Department XI was the "operational reconnaissance of North America." J.A. 726. Its purpose was to "acquire data of significance to the German Democratic Republic . . . that could not be acquired by legal means." J.A. 726. In the early 1970s, Stand began working for Ziemer as an HVA agent.

Stand's HVA activities consisted primarily of recruiting other agents. In 1976, Stand invited James Michael Clark, a college friend, to travel with him to Germany. Stand introduced Clark to an HVA operative, who introduced him to Ziemer. Ziemer invited Clark to join his organization, which he described as performing intelligence work on behalf of East Germany and other socialist countries, as well as "liberation movements" in Asia, Latin America, and Africa. J.A. 903. Clark agreed. Sometime between 1979 and 1981, Stand brought his wife Theresa Squillacote into the fold, and she too became what Ziemer described as an "informal collaborator[]." J.A. 703. At some point, Squillacote's relationship with Ziemer became more than professional, and they had an affair that lasted until 1996.

The HVA devoted substantial resources to the training of Stand, Squillacote, and Clark. They traveled to many countries, including East Germany and Mexico, to meet with their "handlers." They received training on detecting and avoiding surveillance, receiving and decoding messages sent

by shortwave radio from Cuba, mailing and receiving packages through the use of "accommodation" addresses, using codewords and phrases, using a miniature camera to photograph documents, and removing classified markings from documents. HVA records indicate that the three conspirators were together paid more than $40,000 between 1985 and 1989, primarily as reimbursement for travel expenses.

As part of his "operational plan" devised with Ziemer, J.A. 925, Clark moved to Washington, D.C., and obtained a master's degree in Russian. For a time Clark worked for a private company in a position that required him to obtain a security clearance. He later obtained a position with the United States Army, in its environmental law division, which also required a security clearance. Clark had friends who worked for the State Department, and through them he obtained numerous classified documents that he turned over to the HVA.

Squillacote and Stand also moved to Washington, D.C., and she went to law school at the HVA's suggestion. Squillacote first followed in her father's footsteps by becoming an attorney for the National Labor Relations Board. When she realized that she had taken a career path that was not "in the best direction," J.A. 2213, she began trying to "move [her] professional work more in line with the commitments that [she] had made." J.A. 1682. To that end, Squillacote used her father's connections to obtain an unprecedented temporary detail from the NLRB to the House Armed Services Committee. In 1991, Squillacote obtained a permanent job as an attorney in the Department of Defense, eventually becoming the Director of Legislative Affairs in the Office of the Undersecretary of Defense (Acquisition Reform), a position that required a security clearance and provided access to valuable information. During her tenure with the federal government, Squillacote applied for numerous government jobs, including positions with the Central Intelligence Agency, the National Security Agency,

United States Army, Navy, and Air Force, and the Departments of State, Commerce, Energy, and Treasury. Apparently it was not until she began working for the Department of Defense that Squillacote gained access to the kind of information sought by her handlers.[1] However, by that time, East Germany had collapsed.

After the fall of the Berlin Wall, Ziemer began working with the KGB, the Soviet Union's intelligence agency. Ziemer maintained his relationships with Stand, Squillacote, and Clark during this time, and they, too, became involved with the KGB. Stand, Squillacote, and Clark each traveled overseas to meet with Ziemer during the period after the collapse of East Germany. Ziemer instructed the conspirators to purchase Casio digital diaries with interchangeable memory cards. The conspirators, Ziemer, and their KGB contacts communicated with each other by exchanging memory cards.

In April 1992, Ziemer and another former HVA official were arrested and ultimately convicted for their post-unification intelligence activities with the KGB. Stand, Squillacote, and Clark became understandably concerned about their personal safety after Ziemer's arrest. They knew that "western services" were looking for two men and one woman operating out of Washington, D.C., and that the western services were aware of code names they had used. J.A. 2240. However, they believed that Ziemer and other former HVA officials would not compromise their identities. When Ziemer was released from prison in September 1992, Stand, Squillacote, and Clark reestablished a system of communication with him, one purpose of which was to keep everyone informed about any threats to their safety.

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[1] The government's evidence established that it was not unusual for the HVA to recruit agents and then, "over the course of years . . . seek to install [the agent] into a sector where [the agent] will be of use." J.A. 718.

From the beginning of their involvement with the HVA, Stand, Squillacote, and Clark operated independently of each other and generally were unaware of the others' activities. After Ziemer's arrest in 1992, however, the three began talking in detail about their activities and precautions needed to maintain their security. They began discussing the possibility of future intelligence work, perhaps for Vietnam or Cuba. Squillacote also talked to Clark about her interest in South Africa's Communist Party.

In 1994, Squillacote, as part of her search for "another connection," J.A. 2290, went to Amsterdam to speak to David Truong, whom she had met in college. Truong, who had been convicted of espionage on behalf of North Vietnam, was intrigued, but took no further action.

In 1995, Squillacote went to great lengths to obtain a post office box under the name of "Lisa Martin." In June 1995, Squillacote, as Lisa Martin, sent a letter to Ronnie Kasrils, the Deputy Defense Minister of South Africa. Kasrils was a Communist party official, and had received training in East Germany, the Soviet Union, and Cuba. The letter, which took Squillacote months to write, was primarily devoted to Squillacote's explanation for the collapse of socialism that began with the fall of the Berlin Wall, and her views on how the communist movement should proceed in the future. The letter was an attempt by Squillacote to make a connection with Kasrils, whom Squillacote hoped would "read between the lines." J.A. 1912. Stand and Clark were aware of the letter, but Clark apparently doubted its effectiveness.

In February 1996, Squillacote received a Christmas card from Kasrils addressed to L. Martin. In the card, Kasrils thanked "Lisa" for "the best letter" he had received in 1995. J.A. 1675. Stand and Squillacote were thrilled they received the note, and they began to think that perhaps a connection could be made. In September 1996, Squillacote found another letter from Kasrils in her Lisa Martin post office box. The letter stated that "you may have the interest and vision to assist in our struggle," and invited Squillacote to a meeting in

New York City with a representative of "our special components." J.A. 1681.

Squillacote and Stand, however, were unaware that, for many years, they had been the subjects of an intense FBI investigation. As part of its investigation, the FBI in January 1996 obtained authorization to conduct clandestine electronic surveillance, which included the monitoring of all conversations in the Appellants' home, as well as calls made to and from their home and Squillacote's office. Through its investigation, the FBI had learned of Squillacote's letter to Kasrils and the Appellants' response to the February 1996 note from Kasrils. The September 1996 Kasrils letter in fact was written by the FBI as part of a "false flag" operation intended to uncover information about the prior espionage activities of Stand, Squillacote, and Clark.

When designing the false flag operation, the FBI's Behavioral Analysis Program Team prepared a report "to examine the personality of [Squillacote] and based on this examination, to provide suggestions . . . that could be used in furthering the objective of this investigation—to obtain evidence regarding the subject's espionage activity." J.A. 2057. The report (the "BAP report") was based on information the FBI had learned during its extensive investigation and surveillance of the Appellants.

The BAP report traced Squillacote's family background, including the suicide of her older sister and her mother's history of depression. The report stated that Squillacote was suffering from depression and listed the anti-depressant medications she was taking. The primary focus of the BAP report, however, was Squillacote's emotional makeup and how to tailor the approach to her emotional characteristics.

The report described Squillacote as having "a cluster of personality characteristics often loosely referred to as 'emotional and dramatic,'" J.A. 2060, and recommended taking advantage of Squillacote's "emotional vulnerability" during her period of grieving over the then-recent end of her

affair with Ziemer, using an undercover agent "who possesses the same qualities of dedication and professionalism as her last contact," and structuring the undercover agent's "pitch" to mirror her relationship with Ziemer. J.A. 2061. The BAP report also made very specific recommendations about how the false flag operation should be designed:

> The following scenario has been developed upon an analysis of the subject's personality, and includes suggestions designed to exploit her narcissistic and histrionic characteristics. It is believed that [Squillacote] will be susceptible to an approach through her mail drop based on her recent rejection by her long-term German handler, and her thrill at receiving a Christmas card from the South African official.

J.A. 2064. The report suggested the use of a letter from "the object of [Squillacote's] adulation in South Africa." J.A. 2064. It recommended that the letter instruct Squillacote to travel a circuitous route to the location of the first meeting to "add a sense of excitement and intrigue to the scenario." J.A. 2064. The report recommended the use of a mature male undercover agent, who should "capitalize on [Squillacote's] fantasies and intrigue" by making a "friendly overture," and "act[ing] professional and somewhat aloof yet responsive to her moods. The initial meet should be brief and leave [Squillacote] beguiled and craving more attention." J.A. 2065.

The false flag letter received by Squillacote in September 1996 served its intended purpose. Unaware of any FBI involvement, Squillacote and Stand were thrilled about the letter, and Squillacote began enthusiastically making plans for a trip to New York City to meet the South African emissary.

In October 1996, Squillacote met with an undercover FBI agent posing as a South African intelligence officer. She had face-to-face meetings with the agent a total of four times, including one meeting where she brought Stand and her two

children. Several letters were also exchanged, including a letter that Squillacote wrote at the request of the undercover agent describing her previous activities with Ziemer. In these meetings and letters, Squillacote expressed her enthusiasm for her new South African connection and her hope for a productive collaboration.

Throughout her association with the undercover agent, Squillacote discussed the possibility of bringing Ziemer and other former East German contacts into the operation. In December 1996, she contacted Ziemer to see if he was interested in the operation. According to Squillacote, Ziemer's response was "[y]es, yes, yes, yes, yes!" J.A. 1939.

At the second meeting with the undercover agent on January 5, 1997, Squillacote presented the agent with four classified documents she had obtained from the Department of Defense. Although the agent had never requested any documents or classified information from Squillacote, she explained that one day when she and her secretary were alone in her office, she decided to "score what [she] could score." J.A. 509. In fact, she had obtained one of the documents even before her *first* meeting with the undercover agent. The documents Squillacote gave to the undercover agent were: (1) "Defense Planning Guidance for Fiscal Year 1997 through 2001," J.A. 499, a numbered document, classified "secret," with restricted dissemination; (2) "Defense Planning Guidance Scenario Appendix" for 1998 through 2003, J.A. 501, a numbered document classified at the "secret" level, which forbade reproduction or further dissemination without authorization; (3) "Defense Planning Guidance, Fiscal Years 1996 through 2001, Final For Comment Draft," J.A. 504, which was classified "secret," with restricted dissemination; and (4) an untitled CIA intelligence report classified "secret," with restricted dissemination. Three of the documents Squillacote gave to the undercover agent were copies; the "Scenario Appendix" was an original that Squillacote said would not be missed. These documents formed the basis of the charges against Squillacote and Stand.

Shortly after this meeting, Squillacote quit her job with the Department of Defense, a political maneuver she hoped would put her in position for a more prestigious job.[2] Nonetheless, Squillacote continued meeting and corresponding with the undercover agent for several more months, until she and Stand were arrested in October 1997. A search of their home uncovered a wealth of incriminating evidence, including a miniature camera, a Casio digital diary and memory cards, and an extra copy of two of the documents given to the undercover agent.

Clark eventually pleaded guilty to a single charge of conspiring to commit espionage, and he testified for the government at the trial of Squillacote and Stand. At trial, the government introduced certain HVA records, including "true name" cards showing the names and addresses of Stand, Squillacote, and Clark, as well as documents listing some of their code names and the names of the operations to which they were assigned. The HVA records listed Squillacote as a "[d]evelopmental agent" whose target was the "U.S. central government" and described Squillacote as trustworthy. J.A. 2028. The records described Stand as reliable, and listed him as a "[s]ource with direct access," with a target of "U.S. union/organization, direct/upper level, EBFG union, U.S.A." J.A. 2034. Clark was listed as a "[s]ource with direct access," whose activities were targeted against the "Defense Ministry NATO Country FRG USA." J.A. 2010. The records also described Clark as reliable. Other than the four documents passed to the undercover agent, the government presented no

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[2] However, Squillacote explained to the undercover agent that her involvement in the political maneuvering and her decision to quit were primarily motivated by her "joint efforts" with the undercover agent. Squillacote believed that her former Department of Defense boss might be named Deputy Secretary of Defense and that she would be able to follow her former employer back into the Department. Squillacote described this scenario as "the big time," noting that if it worked out, there would be a "straight f---ing line," J.A. 515, presumably to the Secretary of Defense. This scenario never came to pass.

evidence establishing that Squillacote or Stand had previously supplied classified documents or information to Ziemer or anyone else.

Squillacote and Stand were convicted of conspiracy to transmit information relating to the national defense, *see* 18 U.S.C.A. § 794(a) and (c) (West 2000); attempted transmission of national defense information, *see* 18 U.S.C.A. § 794(a); and obtaining national defense information. *See* 18 U.S.C.A. § 793(b) (West 2000).[3] Squillacote was also convicted of making false statements. *See* 18 U.S.C.A. § 1001 (West 2000).

Squillacote and Stand appeal, raising numerous issues arising during the course of the prosecution. We address each issue, although not in the order presented by the Appellants.

II.

The Appellants filed several pre-trial motions to suppress various portions of the government's evidence. The district court denied each of the motions, and the Appellants challenge those rulings on appeal.

A.

The government conducted 550 consecutive days of clandestine surveillance of the Appellants, surveillance that was authorized under the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C.A. § 1801 - 1811 (West 1991 & Supp. 2000). FISA was enacted "to put to rest a troubling constitutional issue" regarding the President's "inherent power to conduct warrantless electronic surveillance in order to gather foreign intelligence in the interests of national security," *ACLU Found. of Southern California v. Barr*, 952

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[3] As to each of these counts, the indictment also alleged violations of 18 U.S.C.A. § 2(a) (West 2000), which provides that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

F.2d 457, 460 (D.C. Cir. 1991), a question that had not been definitively answered by the Supreme Court. *See id.* at 461. "FISA thus created a 'secure framework by which the Executive Branch may conduct legitimate electronic surveillance for foreign intelligence purposes within the context of this Nation's commitment to privacy and individual rights.'" *Id.* (quoting S. Rep. No. 604, pt. 1, 95th Cong., 1st Sess. 15 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3916)).

FISA established a special court, composed of seven federal district court judges appointed by the Chief Justice, which reviews applications for authorization of electronic surveillance aimed at obtaining foreign intelligence information. *See* 50 U.S.C.A. § 1803. "With several exceptions not here relevant, electronic surveillance of a foreign power or its agents may not be conducted unless the FISA Court authorizes it in advance." *ACLU of Southern California*, 952 F.2d at 461.

Each application to the FISA court must first be personally approved by the Attorney General. *See* 50 U.S.C.A. § 804(a). The application must contain, among other things,

> a statement of reasons to believe that the target of the surveillance is a foreign power or agent of a foreign power, specified information on the implementation of the surveillance, and a "certification" from a high-ranking executive branch official stating that the official "deems the information sought to be foreign intelligence information" and that the information sought cannot be obtained by other means.

United States v. Pelton, 835 F.2d 1067, 1075 (4th Cir. 1987); *see* 50 U.S.C.A. § 1804(a)(7). Where the target of the

surveillance is a "United States person,"[4] the FISA court may issue an order authorizing the surveillance only if the FISA judge concludes that there is "probable cause to believe that the target of the surveillance is a foreign power or agent of a foreign power, that proposed 'minimization procedures' are sufficient under the terms of the statute, that the certifications required by § 1804 have been made, and . . . that the certifications are not 'clearly erroneous.'" *Pelton*, 835 F.2d at 1075; *see* 50 U.S.C.A. § 1805(a) (setting forth the findings necessary to support the issuance of an order authorizing surveillance).

Prior to trial, the Appellants sought to suppress the fruits of the FISA surveillance. They attacked the validity of the surveillance on several grounds, all of which were rejected by the district court. On appeal, however, the Appellants press only one FISA-related issue: They contend that the surveillance was improper because there was no probable cause to believe that Squillacote or Stand were agents of a foreign power. We disagree.

Under FISA, an agent of a foreign power is any person who "knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States." 50 U.S.C.A. § 1801(b)(2)(A). One who knowingly aids and abets another engaging in such clandestine intelligence activities, or one who knowingly conspires with another to engage in the clandestine intelligence activities, is also considered an agent of a foreign power. *See* 50 U.S.C.A. § 1801(b)(2)(D). A "United States

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[4] *See* 50 U.S.C.A. § 1801(i) ("'United States person' means a citizen of the United States, an alien lawfully admitted for permanent residence . . ., an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power . . . .").

person" may not be determined to be an agent of a foreign power "solely upon the basis of activities protected by the first amendment to the Constitution of the United States." 50 U.S.C.A. § 1805(a)(3)(A).

FISA provides that the district court must review *in camera* and *ex parte* the FISA application and other materials necessary to rule upon a defendant's suppression motion "if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C.A. § 1806(f). Because the Attorney General filed such an affidavit in this case, the district court reviewed the applications and other materials in camera, and the documents were not disclosed to counsel for the Appellants. *See* 50 U.S.C.A. § 1806(f) (The district court "may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.").

After reviewing the applications, the district court concluded that each of the more than 20 FISA applications established probable cause to believe that the Appellants were agents of a foreign power. We have reviewed *de novo* the relevant materials, and likewise conclude that each FISA application established probable cause to believe that Squillacote and Stand were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted. *See* 50 U.S.C.A. § 1801(a) (defining "foreign power"); 50 U.S.C.A. § 1801(b) (defining "agent of a foreign power"). We are also satisfied that the Appellants were not targeted solely because of any protected First Amendment activities in which they may have engaged. Given the sensitive nature of the information upon which we have relied in making this determination and the Attorney General's conclusion that disclosure of the underlying

information would harm the national security, it would be improper to elaborate further. *See United States v. Isa*, 923 F.2d 1300, 1304 (8th Cir. 1991) (finding probable cause to authorize FISA surveillance and declining to comment further on the probable cause issue where the Attorney General filed an affidavit and claim of privilege).

Accordingly, we reject the Appellants' contention that the FISA surveillance was illegal. In addition, because the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance, we also deny the Appellants' request for disclosure of the FISA materials. *See United States v. Belfield*, 692 F.2d 141, 147 (D.C. Cir. 1982) ("The language of section 1806(f) clearly anticipates that an *ex parte, in camera* determination is to be the rule. Disclosure and an adversary hearing are the exception, occurring only when necessary.").

B.

The Appellants also sought to suppress the evidence obtained during the search of their home, including the miniature camera, the digital diary and memory cards, a doll with a roll of miniature film hidden inside, and copies of two of the documents Squillacote passed to the undercover agent. The Appellants contend that the search was conducted in flagrant disregard of the express terms of the warrant, and that the district court therefore erred in denying their suppression motion.

The warrant authorizing the search of the Appellants' home stated that the government was to search the residence "on or before October 10, 1997 (not to exceed ten days) serving this warrant and making the search [ ]in the daytime—6:00 A.M. to 10:00 P.M." J.A. 330.[5] The search

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[5] *See* Fed. R. Crim. P. 41(c)(1) (A search warrant "shall be served in the daytime, unless the issuing authority . . . authorizes its execution at times other than daytime."); Fed. R. Crim. P. 41(h) (defining "daytime" as "the hours from 6:00 a.m. to 10:00 p.m.").

extended over six days, with two FBI agents remaining at the house each night. It is the presence of the FBI agents in the home after 10:00 p.m. that forms the basis of the Appellants' suppression arguments.

(1)

The Appellants first contend that, by remaining inside the Appellants' home overnight for five consecutive nights, the FBI searched the home at night, thus flagrantly disregarding the warrant's time restriction. We are wholly unpersuaded by this argument.

Preliminarily, we reject the main premise of the Appellants' challenge to the search: that the *presence* of the agents in the house, in and of itself, constitutes a search that should be considered separate and distinct from the authorized search of the residence. The cases upon which the Appellants rely for this proposition—*Segura v. United States*, 468 U.S. 796 (1984), and *United States v. Jacobsen*, 466 U.S. 109 (1984)—involved questions about the nature and propriety of law enforcement conduct that occurred *without* a warrant. *See Segura*, 468 U.S. at 799-801; *Jacobsen*, 466 U.S. at 111-12.[6] Thus, a determination of whether the conduct amounted to a search or seizure in those cases was a necessary predicate to the resolution of the Fourth Amendment claims raised. In this case, there is simply no doubt that the government searched the Appellants' home and seized an abundance of incriminating evidence. The search and seizure, however, were authorized by a warrant, the validity of which the Appellants do not challenge. Where a search is authorized by a warrant, we believe it unnecessary and improper to isolate

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[6] We note that the Supreme Court has recently granted *certiorari* in *Illinois v. McArthur*, 713 N.E.2d 93 (Ill. App. Ct. 1999), to determine whether the police may secure a residence from the outside, and prohibit the defendant from entering the house unless accompanied by a police officer, for approximately two hours while awaiting a search warrant. *See Illinois v. McArthur*, 120 S. Ct. 1830 (2000).

certain conduct occurring during the execution of the warrant and treat that conduct as a separate and discrete search. Instead, the government's actions while executing a warrant must be considered in context, and the question that must be answered is whether the government exceeded the scope of the warrant. *See, e.g., Walter v. United States*, 447 U.S. 649, 656 (1980) (plurality opinion) ("When an official search is properly authorized—whether by consent or by the issuance of a valid warrant—the scope of the search is limited by the terms of its authorization."). We first conclude that the government did not exceed the scope of the warrant. Second, we conclude that even if the government did exceed the scope of the warrant, blanket suppression of all evidence seized would not be required.

(a)

Distilled to its essence, the Appellants' "flagrant disregard" argument is this: (1) The warrant authorized searching the residence only between the hours of 6:00 a.m. and 10:00 p.m.; (2) government agents remained inside the residence between 10:00 p.m. and 6:00 a.m.; (3) *ipso facto*, the government flagrantly disregarded the terms of the warrant. The validity of this argument, however, is largely dependent upon the Appellants' assumption that the mere presence of the agents in the house amounted to a search, an assumption we have already rejected. And without this assumption, the argument fails, as we discuss below.

When denying the Appellants' motion to suppress, the district court found that the government complied with the warrant by conducting the search "during the hours that were set out in the warrant." J.A. 415. This conclusion is supported by the affidavit of Special Agent Gregory Leylegian, an FBI agent who took part in the search. Leylegian's affidavit stated that the FBI "conducted no searching of the premises after 10:00 p.m. each day" and that "[t]he FBI maintained two agents on the premises each night to preserve the integrity of the search process, to expedite the completion of the search, and to maintain security of the

premises to prevent the removal or destruction of evidence." J.A. 360. Because the district court's factual determination of the conduct actually engaged in by the FBI agents is supported by the evidence presented at the suppression hearing and is not implausible, the standard of review governing this issue dictates that we accept that conclusion. *See United States v. Lattimore*, 87 F.3d 647, 651 (4th Cir. 1996) (en banc) (A district court's factual determination is clearly erroneous if "it can be said that the view of the evidence taken by the district court is implausible in light of the entire record."). The warrant provided only that the search must be conducted between the hours of 6:00 a.m. and 10:00 p.m.; it did not expressly prohibit the presence of non-searching agents in the house after 10:00 p.m. Because the FBI did not search during the hours prohibited by the warrant, we therefore conclude that the FBI did not exceed the scope of the warrant by remaining in the house overnight.

(b)

Nonetheless, even if we were to conclude that the FBI exceeded the scope of the warrant, we still would not conclude that the government's actions required suppression of all the evidence seized during the search. As a general rule, if officers executing a search warrant exceed the scope of the warrant, only the improperly-seized evidence will be suppressed; the properly-seized evidence remains admissible. *See United States v. Jones*, 31 F.3d 1304, 1314 (4th Cir. 1994); *see also Horton v. California*, 496 U.S. 128, 140 (1990) ("If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more. Thus, in the case of a search incident to a lawful arrest, if the police stray outside the scope of an authorized . . . search they are already in violation of the Fourth Amendment, and evidence so seized will be excluded . . . ." (emphasis added) (alteration and internal quotation marks omitted)). However, "[i]n extreme circumstances even properly seized evidence may be

excluded when the officers executing the warrant exhibit a flagrant disregard for its terms." *United States v. Ruhe*, 191 F.3d 376, 383 (4th Cir. 1999) (internal quotation marks omitted).

The extraordinary remedy of blanket suppression of all evidence seized "should be used only when the violations of the warrant's requirements are so extreme that the search is essentially transformed into an impermissible general search." *United States v. Chen*, 979 F.2d 714, 717 (9th Cir. 1992); *accord United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988). Thus, in the few cases where blanket suppression has been ordered, most involved the seizure by law enforcement officials of large quantities of evidence clearly not within the scope of the warrant. *See United States v. Foster*, 100 F.3d 846, 948 (10th Cir. 1996); *Medlin*, 842 F.2d at 1196, 1199; *United States v. Rettig*, 589 F.2d 418, 420-21 (9th Cir. 1978).

In this case, however, the Appellants do not contend that any of the evidence seized by the government was beyond the scope of the warrant or that, by remaining in the house after 10:00 p.m., the government impermissibly converted the warrant into a general warrant. Instead, the Appellants complain only about the manner by which the government executed the warrant, a complaint that is inadequate to justify the severe remedy of blanket suppression.

First, we note that when a warrant authorizes only a daytime search, some courts have held that there is no violation of the terms of the warrant if the search is commenced in the daytime, even if it continues into the night. *See, e.g., United States v. Young*, 977 F.2d 1099, 1104-05 (1st Cir. 1989); *United States v. Burgard*, 551 F.2d 190, 193 (8th Cir. 1977); *United States v. Joseph*, 278 F.2d 504, 505 (3rd Cir. 1960) (per curiam). Because the search of the Appellants' home was commenced in the daytime, as required by the warrant, the FBI agents reasonably could have believed (if their actions after 10:00 p.m. could be considered a search) that it was proper to continue the search into the night.

Second, the FBI reasonably could have concluded that it was proper to station agents inside the house after the search was suspended each evening in order to guard against the possible destruction of evidence. *Cf. United States v. Gagnon*, 635 F.2d 766, 769 (10th Cir. 1980) (concluding that when agents executing a search warrant discovered more marijuana than they could transport, the agents were responsible for preserving the evidence, and properly remained on the scene overnight and resumed the search the next day, when a truck arrived that could carry away the drugs). The reasonableness of the agents' conduct makes it difficult to conclude that they flagrantly disregarded the terms of the warrant.

Under these circumstances, even if the FBI's actions amounted to technical violations of the terms of the warrant, the violations were relatively minor and were "motivated by considerations of practicality rather than by a desire to engage in indiscriminate 'fishing.'" *United States v. Tamura*, 694 F.2d 591, 597 (9th Cir. 1982). Thus, any violations are wholly insufficient to require blanket suppression of all the evidence seized under the warrant.

(2)

In a last-ditch effort to invalidate the search, the Appellants contend that if the government did in fact stop searching each night at 10:00, then the evidence must still be suppressed because the government did not obtain a new warrant for each successive day of searching. Again we disagree.

It is beyond dispute that FBI agents entered the Appellants' home on six consecutive days to search for evidence. However, given the number and type of items that can be evidence of espionage-related activities, the search was necessarily extensive and exhaustive. *See United States v. Wuagneux*, 683 F.2d 1343, 1352 11th Cir. 1982) ("[T]he magnitude of a search is insufficient, by itself, to establish a constitutional violation; rather, the relevant inquiry is whether the search and seizures were reasonable under all the

circumstances. . . . [G]iven the complexity of the crimes under investigation and the fact that they would be detected primarily if not exclusively through analysis and synthesis of a large number of documents, a rather extensive search could reasonably be expected.").

As Agent Leylegian explained in his affidavit, a "search for evidence of espionage . . . requires extreme thoroughness in order to discover the covert instruments, communications, and records of the illegal activity." J.A. 358. In addition, the search was complicated by the condition of the home. According to Leylegian, "[t]he house was extremely cluttered, and the [Appellants'] personal possessions and documents were of such quantity and in such a state of disarray as to create a great obstacle to the execution of the warrant." J.A. 359. The search was further complicated because the house was undergoing renovations, which increased the clutter and made it difficult to search certain areas of the house. Leylegian also explained that the agents were unable to search the basement, where many items were located, "for long stretches of time due to the irritation caused by an immense amount of dust and the odor of cat urine." J.A. 360. Therefore, notwithstanding the large number of agents involved in the search, it is apparent that the search could not have been completed in a single day. Under these circumstances, the subsequent entries were not separate searches requiring separate warrants, but instead were simply reasonable continuations of the original search. The government, therefore, was not required to obtain additional warrants for each day that the search continued. *See United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (concluding that second search conducted two hours after first search was a proper continuation of the first search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (upholding under a single warrant a second search occurring several hours after initial search: "The authority of the warrant had not expired and therefore the return search was not beyond the scope of the Fourth Amendment."); *United States v. Bowling*, 351 F.2d 236, 241 (6th Cir. 1965)

(upholding entries on successive days pursuant to a single warrant); *see also United States v. Gerber*, 994 F.2d 1556, 1558-60 (11th Cir. 1993) (reversing the suppression of evidence found on Monday during search under the hood of a car even though warrant authorizing the search of the car expired on the previous Friday).

Although this search may well have extended over a substantially longer period of time, the length of the search was a function only of the nature of the evidence sought and the condition of the home. To require the government to obtain a new search warrant for each continued day of searching would impose an undue burden on the government's efforts to investigate complex crimes, a burden that would be unjustifiable under the circumstances of this case. *See United States v. Sakyi*, 160 F.3d 164, 167 (4th Cir. 1998) ("The touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. Reasonableness is determined by weighing the public interest against the individual's right to personal security free from arbitrary interference by law officers." (citations and internal quotations omitted)). Accordingly, we conclude that the district court properly denied the Appellants' motion to suppress the evidence obtained during the search of their house.

C.

During the FISA-authorized surveillance of the Appellants, the government intercepted several telephone calls between Squillacote and her psychotherapists. Only the first two of these conversations, however, were listened to or transcribed by the government.[7] Once the supervising FBI

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[7] Actually, one of these conversations was between Stand and one of Squillacote's therapists. Because Squillacote gave the therapist permission to talk to Stand, we will assume for purposes of this discussion that the conversation was privileged, and, in the interest of convenience,

agent learned of the conversations, she instructed the agent responsible for transcribing and indexing the conversations not to listen to, index, or transcribe any other conversations between Squillacote and her therapists.

The Appellants moved to suppress any evidence derived from the privileged communications, and requested a hearing to require the government to prove that the evidence it would present at trial was derived from sources independent of the privileged communications. The district court refused to hold the hearing, concluding that such a hearing was required only when a constitutionally-based privilege was at issue.

On appeal, the Appellants contend that the FBI employee who listened to and transcribed the conversations between Squillacote and her therapists was involved in the preparation of Squillacote's BAP report, and that privileged information was therefore used to formulate the false flag operation that led to the arrest of the Appellants. The Appellants contend that any evidence derived from the privileged information should have been suppressed and that they were entitled to a hearing to vindicate the principles set forth by the Supreme Court in *Kastigar v. United States*, 406 U.S. 441 (1972). We, however, conclude that *Kastigar* simply is not applicable to this case.

In *Kastigar*, the issue was whether a witness who asserts his Fifth Amendment privilege against self-incrimination may be compelled to testify "by granting immunity from the use of compelled testimony and evidence derived therefrom ('use and derivative use' immunity), or whether it is necessary to grant immunity from prosecution for offenses to which compelled testimony relates ('transactional' immunity)." *Id.* at 443. The Court concluded that a grant of "immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient

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we refer to both conversations as having taken place between Squillacote and her therapists.

to compel testimony over a claim of the privilege." *Id.* at 453. The Court noted that if a witness who has been granted use and derivative use immunity is subsequently prosecuted, the prosecutors bear "'the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.'" *Id.* at 460 (quoting *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 n.18 (1964)). The Court further explained that "[t]his total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." *Id.* at 460 (footnote omitted).

We agree with the Appellants that Squillacote's conversations with her psychotherapists are privileged. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) ("[W]e hold that confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence."). The question, then, is whether the mere existence of this privileged information brings to bear the full weight of *Kastigar*, as Appellants apparently contend.

Contrary to the Appellants' view, a *Kastigar* analysis is not triggered by the existence of evidence protected by a privilege, but instead by the government's effort to compel a witness to testify over the witness's claim of privilege. *See United States v. Hubbell*, ___ S. Ct. ___, ___, 2000 WL 712810, *6 (2000) (stating that *Kastigar* "particularly emphasized the critical importance of protection against a future prosecution based on knowledge and sources of information obtained from the *compelled testimony*" (emphasis added) (internal quotation marks omitted)); *United States v. McHan*, 101 F.3d 1027, 1035 (4th Cir. 1996) ("Whether the oral use-immunity agreement at issue in this case is subject to the full *Kastigar* protections is doubtful because McHan voluntarily cooperated with the

government."); *United States v. Eliason*, 3 F.3d 1149, 1152 (7th Cir. 1993) (Under *Kastigar*, "if a defendant is able to establish through relevant evidence that he gave compelled testimony in a court proceeding based upon a promise of immunity, the government must come forth with evidence that the information it purports to use against the defendant came from a source independent of the defendant's immunized testimony."); *United States v. Gutierrez*, 696 F.2d 753, 756 n.6 (10th Cir. 1982) ("Because [the defendant], with full knowledge of her rights, voluntarily agreed to make a statement, the constitutional principles enunciated in *Kastigar* . . . are inapplicable to her claim."). If the privilege can be vindicated through a grant of immunity—as can, for example, the privilege against self-incrimination—then the witness may be compelled to testify if an adequate offer of immunity is made.

To this extent then, we agree with the Appellants' assertion that *Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege. For example, a spouse asserting the adverse spousal testimony privilege or the marital communications privilege may be compelled to testify if the prosecutor gives an adequate promise that the information will not be used against the other spouse. *See, e.g., In re Grand Jury*, 111 F.3d 1083, 1087 (3rd Cir. 1997) ("[O]nce the government grants immunity that eliminates the possibility that the testimony will be used to prosecute the witness's spouse, the witness spouse may no longer invoke the testimonial privilege."); *In re Grand Jury Subpoena of Ford*, 756 F.2d 249, 252 (2nd Cir. 1985) (concluding that husband could be held in contempt for refusing to testify before the grand jury about actions of his wife where the prosecutor promised that "no grand jury testimony elicited from [the husband] would be used, either directly or indirectly, against [his] wife"). However, because the government's right to compel testimony in the face of a claim of privilege is the issue at the heart of *Kastigar*, its protections do not apply in

cases where there is privileged evidence, but no compelled testimony.

Moreover, because "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence," any such privilege "must be strictly construed." *Trammel v. United States*, 445 U.S. 40, 50 (1980) (ellipses in original) (citation and internal quotation marks omitted). Thus, we do not believe that suppression of any evidence derived from the privileged conversations would be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based. *See United States v. Elie*, 111 F.3d 1135, 1142 (4th Cir. 1997) (rejecting defendant's claim that evidence found as a result of his custodial statements made without receiving *Miranda* warnings should be suppressed because "the 'tainted fruits' analysis applies only when a defendant's constitutional rights have been infringed").

Other circuits have rejected similar arguments under similar circumstances. For example, in *United States v. Marashi*, 913 F.2d 724 (9th Cir. 1990), the court concluded that the testimony of the defendant's ex-wife was not barred by the marital communications privilege, and the court therefore declined to address the defendant's argument that all evidence derived from the ex-wife's information and testimony should be suppressed. *See id.* at 731 n.11. The court noted, however, that "no court has ever applied the [fruit-of-the-poisonous-tree] theory to any evidentiary privilege." *Id.*; *see also Nickel v. Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) (even if testimony of attorney consulted by the defendant before the defendant was charged with a crime should have been suppressed on the basis of a breach of the attorney-client privilege, evidence obtained by the police that was derived from the attorney's information should not have been suppressed); *United States v. Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir. 1980) ("Because we reject . . . Lefkowitz's argument that the marital privileges are somehow constitutionally grounded in, among other locations, the

Fourth Amendment, we doubt that a secondary source of information obtained through information protected by the confidential marital communications privilege would in any way be 'tainted.'").

Because this case does not involve the use of compelled testimony, the district court properly refused the Appellants' request for a *Kastigar* hearing. In addition, because the privilege at issue here is not a constitutional one, the district court properly refused to suppress any evidence arguably derived from the government's interception of the two conversations with Squillacote's therapists.[8]

III.

Perhaps some of the most damaging evidence introduced against the Appellants at trial were the HVA documents—the "true name" cards listing the names of the Appellants and their code names, and the "agent data sheets" showing the nature of their assignments for the HVA. The Appellants moved to prevent the introduction of these documents, but the district court denied the motion. On appeal, the Appellants contend that the documents were improperly admitted, arguing that they were not properly authenticated and that, even if authenticated, the documents were inadmissible hearsay.

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[8] We recognize that in *United States v. White*, 970 F.2d 328 (7th Cir. 1992), a case where the defendants' sixth amendment rights to counsel were not at issue, the Seventh Circuit suggested that, had there been any government involvement in the breach of the attorney-client privilege, the proper remedy would be the suppression of the privileged evidence, as well as any derivative evidence. *Id.* at 336. Even assuming that suppression of derivative evidence may, under extraordinary circumstances, be required in cases involving the attorney-client privilege, such an extreme remedy is not required in this case.

A.

The Federal Rules of Civil Procedure provide that official records of a foreign country are considered properly authenticated if the records are

> attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is a chain of certificates of genuineness of signature and official position relating to the attestation.

Fed. R. Civ. P. 4(a)(2).[9] "A final certification may be made by a secretary of embassy or legation, consul general, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States." *Id.* Rule 902(3) of the Federal Rules of Evidence sets forth an essentially identical self-authentication process for the somewhat broader category of "foreign public documents" "purporting to be executed or attested in an official capacity" by a foreign official. *See* Fed. R. Evid. 902(3); *id.* advisory committee's note (Rule 902(3) "is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.").

In this case, the government presented a certification from Dirk Dorrenberg, the director of the counterespionage and protective security department of the Bundesamt fur Verfassungsschutz, the counterintelligence service for the unified Federal Republic of Germany ("FRG"). In his

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[9] The procedure set forth in Rule 44(a)(2) is applicable in criminal proceedings by virtue of Rule 27 of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 27 ("An official record . . . may be proved in the same manner as in civil actions.").

certification Dorrenberg stated that the FRG is the legal successor to East Germany and that he had the "authority to make this certification by virtue of [his] official position and area of expertise." J.A. 1982. Dorrenberg stated that he had compared the HVA documents introduced by the government to "actual duplicates" of the original records, and he certified that the government's copies were "true and correct copies" of "genuine and authentic records" of the HVA. J.A. 1983-84. Dorrenberg also certified that the signature of Lothar Ziemer appearing on some of the records was "genuine and authentic." J.A. 1984. The government also presented a final certification from Manfred Bless, an FRG representative "assigned and accredited to the United States as a Counselor, Political Section, of the Embassy of the Federal Republic of Germany, in Washington, D.C." J.A. 1980. In this final certification, Bless certified that Dorrenberg held the position claimed in the Dorrenberg certification and that Dorrenberg was authorized to make the certification.

These certifications comply in all respects with the requirements of Rule 44(a)(2) and Rule 902(3). Therefore, whether the documents are considered official documents or official records, the district court quite properly concluded that the government adequately authenticated the HVA documents.

The Appellants, however, contend that the certification process of Rule 902(3) is intended to confirm the signature or attestation *contained in the offered document*. According to the Appellants, if the document being offered into evidence does not contain a signature, a self-serving declaration of authenticity is meaningless. Thus, the Appellants contend that many of the HVA documents are not subject to self-authentication under the rules because the documents themselves are not signed or do not contain an attestation. This argument is without merit.

Nothing in Rule 44(a)(2) or in Rule 902(3) requires that the documents themselves be signed or contain an attestation within the body of the document. The rules are written in the

alternative—foreign documents may be authenticated by a certification from the official executing the document or by an official attesting to the document. To "attest" means to "affirm to be correct, true, or genuine." *American Heritage College Dictionary* 89 (3d ed. 1997). Thus, so long as a proper official attests that the proffered document is true and genuine, it simply does not matter whether the document itself is signed or contains its own attestation.

As noted above, Rule 44(a)(2) also requires a final certification regarding the signature and position "(i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation." Fed. R. Civ. P. 44(a)(2); *see also* Fed. R. Evid. 902(3)(A) & (B). Seizing on these requirements, the Appellants contend that neither the Dorrenberg certification nor the Bless certification establish that "Doffenberg is an official 'whose certificate of genuineness of signature and official position relates to the execution or attestation' or that his certificate is in a 'chain of certificates of genuineness of signature and official position relating to the execution or attestation.'" Brief of Appellants at 73. This argument is likewise without merit, as it is premised upon a fundamental misapprehension of the requirements for the authentication of foreign documents.

An examination of Rule 44(a)(2) and Rule 902(3) reveals two requirements for the authentication of a foreign document. First, there must be some indication that the *document* is what it purports to be. Thus, the proffered document must be executed by a proper official in his official capacity, or the genuineness of the document must be attested to by a proper official in his official capacity. *See* Fed. R. Civ. P. 44(a)(2); Fed. R. Evid. 902(3); *see also United States v. Doyle*, 130 F.3d 523, 545 (2d Cir. 1997) (noting that the authentication provisions of the Rules of Evidence are not concerned with establishing the truth of information contained

in proffered documents, but only with "assuring that evidence is what it purports to be"). Second, there must be some indication that the *official* vouching for the document is who he purports to be. Thus, the rules require that one of a specified group of foreign officials must issue a final certification attesting to the genuineness of signature and title of the person executing or attesting to the document, or of another official who has certified the signature and position of the person executing or attesting to the document. By the plain language of the rules, it is only when the genuineness of signature and position is established in the second manner described above that it is relevant whether the official is "relate[d] to" the execution or attestation or is in the "chain of certificates of signature and position." *See* Fed R. Civ. P. 44(a)(2); Fed. R. Evid. 902(3).

In this case, the government satisfied the first requirement of establishing that the HVA records were what they purported to be by presenting Dorrenberg's certification that the government's records were true and accurate copies of genuine HVA records. The government then established that the official vouching for the document was who he purported to be in the first manner described above—by presenting a final certification from another official establishing that it was Dorrenberg's signature on the proffered certification and that Dorrenberg was authorized to attest to the authenticity of the HVA documents. Because the government established the genuineness of signature and position of the person attesting to the documents, the portions of the rules dealing with officials related to the execution or attestation or in the chain of certifications are not applicable.

Finally, contrary to the Appellants' suggestions, the rules do not require the official attesting to the genuineness of foreign documents or records to have possession or custody of the proffered documents, to be an expert in handwriting analysis, or to have been associated with the foreign government at the time the documents were created. *See* Fed. R. Civ. P. 44(a)(2); Fed. R. Evid. 902(3). Accordingly, we

conclude that the government properly authenticated the HVA records, whether the authentication is considered under Rule 44(a)(2) of the Rules of Civil Procedure or under Rule 902(3) of the Rules of Evidence. *Cf. United States v. Koziy*, 728 F.2d 1314, 1322 (11th Cir. 1984) (concluding that World War II-era employment forms showing the defendant's affiliation with the Ukranian police, during a period when Russia was in control of the region, were properly authenticated under Fed. R. Evid. 902(3) where the documents were attested to by "[a] Russian official authorized to authenticate such documents").

B.

The Appellants also challenge the district court's ruling that the HVA documents were admissible as statements of a co-conspirator under Rule 801(d)(2)(E) of the Federal Rules of Evidence. We review the district court's admission of evidence under Rule 801 (d)(2)(E) for an abuse of discretion. *See United States v. Blevins*, 960 F.2d 1252, 1255 (4th Cir. 1992).

Evidence that would otherwise be considered hearsay may be admitted as a statement by a co-conspirator if the government establishes, by a preponderance of the evidence, "(1) that there was a conspiracy involving the declarant and the party against whom admission of the evidence is sought and (2) that the statements at issue were made during the course of and in furtherance of that conspiracy." *Id.*; *see also Bourjaily v. United States*, 483 U.S. 171, 175 (1987). In our view, the district court properly admitted the HVA records as statements by a co-conspirator.

First, the indictment specifically charged the Appellants with conspiring with, among others, "agents and officers of the GDR," J.A. 88, and the government presented ample evidence supporting that allegation, including the government's overwhelming evidence of the Appellants' relationship with Lothar Ziemer, whose signature appears on many of the disputed HVA documents. Second, although some of the documents are undated, many bear dates that are

clearly within the course of the conspiracy as defined by the government's evidence. And many of the undated HVA documents show the same registration number as the dated documents and the documents bearing Ziemer's signature, thus establishing a connection between all of the HVA documents. Accordingly, the government's evidence demonstrated that the statements were made during the course of the conspiracy. Third, there can be no real dispute that, by compiling the information contained in the disputed documents—the Appellants' real and code names, their addresses, the object of their assignments, how they could be contacted—the GDR was acting in furtherance of the conspiracy.

While the identity of the declarant of the unsigned documents may not be known, the only conclusion that can be drawn from the information included in the documents—information that was corroborated in many respects by Clark's testimony and by Squillacote's own statements to the undercover agent—is that the documents were created by or at the direction of East German agents who had knowledge of and were involved in the conspiracy with the Appellants. While there may be cases where the inability to identify the declarant of an alleged co-conspirator's statement could render the statement inadmissible, this is not one of those cases. The HVA documents were sufficiently connected to each other and to the conspiracy established by the government's evidence to make them reliable and admissible under Rule 801(d)(2)(E), notwithstanding the government's inability to identify the declarants. *See United States v. Cruz*, 910 F.2d 1072, 1081 n.10 (3d Cir. 1990) ("Unidentifiability [of the declarant] may be important in some situations, but when the statement itself and the surrounding circumstances provide sufficient evidence of reliability, unidentiflability will not be particularly important.").

We therefore conclude that the HVA records were properly authenticated and were properly admitted as statements of co-conspirators. The Appellants' complaints

about the reliability of the HVA records, including the fact that the government purchased the documents from unidentified sources, merely go to the weight to be accorded the records by the jury, and not to the admissibility of the records. *Cf. Koziy*, 728 F.2d at 1322 (noting that the appellant's contention that Ukranian police documents were forgeries "fails to go their admissibility, but rather to the weight of the evidence").[10]

IV.

Finally, the Appellants raise numerous issues in connection with the district court's instructions to the jury. Their challenges involve the district court's instructions on their entrapment defense, the court's failure to include an instruction on multiple conspiracies, and its explanation to the jury of "information relating to the national defense."

A.

The Appellants raise several issues in connection with the district court's refusal to give their entrapment instructions. There are two elements to the affirmative defense of entrapment: "government inducement and the defendant's lack of predisposition to commit the crime." *United States v. Sligh*, 142 F.3d 761, 762 (4th Cir. 1998); *see United States v. Russell*, 411 U.S. 423, 436 (1973) ("It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense

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[10] Another of the Appellants' complaints about the documents centers around the fact that the documents were not contained in the records of the Gauck Commission, the post-unification repository for MfS documents. The Gauck Commission, however, became the repository only of the "documents that were still there upon dissolution of the MfS, which occurred during December of 1989. The MfS had gone through several transitional phases, which resulted in a good number of documents having disappeared." J.A. 823A. That the documents were not among the Gauck Commission's records does not prevent them from being admitted at trial, but is simply another credibility question to be resolved by the jury.

of entrapment comes into play."). "Where the Government has induced an individual to break the law and the defense of entrapment is at issue . . . the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Jacobson v. United States*, 503 U.S. 540, 548-49 (1992).[11]

(1)

The Appellants first contend that the district court erred by rejecting their proposed predisposition charge. To determine whether the district court's failure to give the requested charge is reversible error, we must determine whether the instruction "(1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Lewis*, 53 F.3d 29, 32 (4th Cir. 1995) (internal quotation marks omitted).

The instruction requested by the Appellants stated that, for the government to carry its burden of proving predisposition, "the Government must prove beyond a reasonable doubt that Ms. Squillacote had a predisposition prior to the first time the Government approached her . . . . However, you may not find a predisposition based on any of Ms. Squillacote's conduct that was induced by the Government." J.A. 1579. The Appellants contend that their instruction is based on *Jacobson*, and that the instruction thus is a correct statement of the law.

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[11] The government contends that the Appellants were not entitled to an entrapment instruction. However, because the government did not oppose the Appellants' request for an entrapment instruction at trial and the instruction was in fact given, we believe it proper to consider the Appellants' challenges to the entrapment instruction.

In *Jacobson*, the defendant had previously ordered through the mail certain magazines depicting nude children at a time when possession of such magazines was legal. After the enactment of a federal statute criminalizing the receipt by mail of sexually explicit depictions of children, the government began targeting the defendant. After more than two years of repeated government solicitations, which involved the use of "five fictitious organizations and a bogus pen pal, to explore [the defendant's] willingness to break the new law by ordering sexually explicit photographs of children through the mail," *id.* at 543, the defendant finally ordered a magazine entitled "Boys Who Love Boys," which contained photographs of young boys engaging in sexual activities. The jury convicted the defendant, rejecting his entrapment defense. The conviction was affirmed by the Eighth Circuit Court of Appeals sitting en banc, which concluded that the defendant "was not entrapped as a matter of law." *Id.* at 547-48.

The Supreme Court, however, disagreed. The Court held that when "the Government has induced an individual to break the law and the defense of entrapment is at issue, . . . the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." *Id.* at 548-49. Concluding that the government failed to prove that the defendant's predisposition to commit the crime was "independent and not the product of the attention that the Government had directed at [the defendant]," *id.* at 550, the Supreme Court reversed the defendant's conviction, *see id.* at 554.

Clearly, then, the first part of the Appellants' requested instruction—that the disposition to commit the crime must exist "prior to first being approached by Government agents"—is a correct statement of the law as explained in *Jacobson*. We do not believe, however, that the second part of the requested instruction is a correct statement of the law.

The second part of the instruction informed the jury that it could "not find a predisposition based on any of Ms. Squillacote's conduct that was induced by the Government." J.A. 1579. While *Jacobson* requires that the defendant's disposition to commit the crime must be "independent of the Government's acts," 503 U.S. at 554, *Jacobson* does not prohibit the consideration of actions occurring after the defendant was contacted by the government when determining whether the defendant was predisposed to commit the crime. *See, e.g., United States v. Garcia*, 182 F.3d 1165, 1169 (10th Cir.) (While *Jacobson* "requires that the defendant's predisposition be viewed at the time the government agent first approached the defendant, inferences about that predisposition may be drawn from events occurring after the two parties came into contact."), *cert. denied*, 120 S. Ct. 448 (1999); *United States v. Byrd*, 31 F.3d 1329, 1336 (5th Cir. 1994) ("[T]he crucial holding of *Jacobson* is that predisposition must be *independent* of government action. Evidence of the defendant's ready response to the solicitation, as well as evidence of independently motivated behavior that occurs after government solicitation begins, can be used to prove that the defendant was predisposed . . . ."); *United States v. Garza-Juarez*, 992 F.2d 896, 908 (9th Cir. 1993) ("[E]vidence of predisposition may arise both before the government's initial contact and during the course of dealings."); *see also United States v. Jones*, 976 F.2d 176, 179 (4th Cir. 1992) ("The government may meet its burden [of proving predisposition] by demonstrating the defendant's ready response to the inducement offered."). Because the Appellants' requested instruction would have prevented the jury from considering Squillacote's actions occurring after being contacted by the undercover agent, actions which may properly be considered under Jacobson, the district court did not err in refusing the instruction.

Moreover, the district court's predisposition instructions were sufficient. The court instructed the jury that:

> A person is entrapped when that person has no *previous disposition* or willingness or intent to commit the crime charged and is induced by law enforcement officers to commit the offense.
>
> A person is not entrapped when that person has a *previous disposition* or willingness or intent to commit the crime charged and a law enforcement officer merely provides what appears to be a favorable opportunity to commit the offense.
>
> . . .
>
> In determining the question of entrapment, you should consider all of the evidence received in this case concerning the intentions and disposition of the defendant *before encountering the law enforcement officer*, as well as the nature and degree of inducement provided by the law enforcement officer.—
>
> The burden is on the Government to prove beyond a reasonable doubt that the defendant had a *previous disposition* or willingness or intent to commit the crime charged. If the Government satisfies that burden, there is no entrapment.
>
> In other words, if the defendant was disposed to commit the crime, there can be no entrapment.

J.A. 1445-47 (emphasis added). By informing the jury that the defendants must have a "previous disposition" that existed "before encountering the law enforcement officer," the instruction given sufficiently conveyed to the jury the requirement that the Appellants must have been predisposed to commit the crimes before they were contacted by the undercover agent. *See United States v. Lorenzo*, 43 F.3d 1303, 1306-07 (9th Cir. 1995) (finding no error in jury charge explaining that the government must prove that the defendant "has a previous intent or disposition" because the jury charge also explained that the disposition must have existed "before

encountering the law enforcement officers or their agents" (internal quotation marks omitted)).[12]

(2)

The Appellants next contend that the district court erred by refusing to instruct the jury that, in order to prove predisposition, the government must prove that Squillacote was "in a position by virtue of his or her acquaintances, experience, occupation, or training to commit the offenses without the government's help or involvement." J.A. 1577. In essence, the Appellants contend that the question of predisposition includes a "positional" element—that is, a defendant is predisposed to commit a crime only if the defendant was in the position to commit the crime without assistance from the government.

The Appellants' "positional" argument is based on the Seventh Circuit's decision in *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc), in which a sharply divided court held that "[p]redisposition is not a purely mental state, the state of being willing to swallow the government's

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[12] The Appellants, however, contend that the government's first contact with Squillacote—the phony Kasrils letter—was an "approach," not an "encounter," because encounter can only mean a face-to-face meeting. Thus, the Appellants argue that by instructing the jury to consider predisposition that existed before the first encounter with the government, the jury may have concluded that Squillacote became predisposed to commit the crimes only after receiving the Kasrils letter, but still rejected the entrapment defense because the disposition arose before Squillacote met the undercover agent for the first time. While it may have been preferable for the instructions to use "approach" or "contact" rather than "encounter," we believe that the district court's instruction sufficiently directed the jury's focus to the proper time frame for determining the existence of Squillacote's predisposition, particularly since there was no dispute that the government's first contact was the Kasrils letter. *See, e.g., United States v. Heater*, 63 F.3d 311, 326 (4th Cir. 1995) ("We will not reverse a conviction based on improper jury instructions as long as the instructions given by the district court, as a whole, included the substance of the defendant's requested . . . charge.").

bait. It has positional as well as dispositional force." *Id.* at 1200. The court determined that defining predisposition only as willingness, without including an element of readiness, was inconsistent with the Supreme Court's decision in *Jacobson*:

> [H]ad the Court in *Jacobson* believed that the legal concept of predisposition is exhausted in the demonstrated willingness of the defendant to commit the crime without threats or promises by the government, then Jacobson was predisposed, in which event the Court's reversal of his conviction would be difficult to explain. The government did not offer Jacobson any inducements to buy pornographic magazines or threaten him with harm if he failed to buy them. It was not as if the government had had to badger Jacobson for 26 months in order to overcome his resistance to committing a crime. He *never* resisted.

Id. at 1199.

Whether predisposition includes a readiness element has yet to be considered in this circuit, although the Ninth Circuit has rejected the *Hollingsworth* formulation. *See United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) ("We read Jacobson not as creating a requirement of positional readiness but as applying settled entrapment law. The inference that the government's methods had persuaded an otherwise law-abiding citizen to break the law, coupled with the absence of evidence of predisposition, established entrapment as a matter of law under the existing two-part test. It was not necessary for the court to expand the entrapment defense, nor is there language in the opinion indicating that it did so.").[13] We need

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[13] A panel of the Fifth Circuit followed Hollingsworth and concluded that predisposition includes a positional element, *see United States v. Knox*, 112 F.3d 802, 807 (5th Cir. 1997), but the Fifth Circuit sitting en banc vacated that portion of the panel opinion, *see United States v. Brace*, 145 F.3d 247, 250 (5th Cir. 1998) (en banc). The en banc court concluded that the question of whether predisposition included a positional element

not, however, decide whether predisposition includes a positional element because even under the *Hollingsworth* formulation, Squillacote clearly was in the position to commit the crimes with which she was charged.

After years of trying, Squillacote finally had a job that provided her with access to classified information and documents. She had received excellent training in the arts of espionage and she had a long relationship with a "spy-master" who was trying to find another connection interested in the services that he and his minions could provide. In addition, as evidenced by her approach of David Truong, the convicted spy, and her letter to her South African hero, Squillacote herself was actively searching for another customer for her skills. Thus, Squillacote was in the position to become an active spy even without the help of the undercover agent. To conclude otherwise would mean that a drug trafficker holding the keys to a warehouse full of cocaine is not in a position to distribute the cocaine while he is searching for a trustworthy customer, a clearly unreasonable and unrealistic conclusion. *See Hollingsworth*, 27 F.3d at 1200 ("The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so . . . . A public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales."). If the evidence in this case does not establish Squillacote's readiness, then we cannot imagine what would be sufficient.

(3)

The Appellants also contend that the district court erred by refusing to instruct the jury that a defendant can be entrapped through forms of inducement more subtle than

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had not been raised at trial or on appeal, and the court therefore expressly declined to consider it. *See id.* at 261.

outright coercion, such as persuasion or an appeal to sympathy. We find no error.

The Appellants' theory of the case was that the FBI, through its BAP report profiling Squillacote, masterfully catalogued Squillacote's every emotional and psychological vulnerability. The FBI then used this information to devise an undercover operation exploiting these weaknesses to ensure that Squillacote would fall for the undercover agent's pitch. The Appellants claim that the agent induced Squillacote into going along with his scheme by making subtle psychological appeals to which he knew Squillacote would be uniquely vulnerable. Consistent with this theory of entrapment, the Appellants requested the following instruction on entrapment:

> Entrapment occurs . . . [w]here the Government goes beyond providing an opportunity for a crime but instead induces its commission by taking advantage of the defendant through such persuasion as appealing to the defendant's political beliefs or to some other alternative, noncriminal type of motive, or by playing on defendant's personal sympathies and life experiences, or by exploiting the unique vulnerabilities of the defendant. The law of entrapment forbids the conviction of [a] person where the Government has played on the weaknesses of an innocent party and beguiled her into committing crimes which she otherwise would not have attempted had she not been induced by the Government.

J.A. 1575-76.

The district court refused to give this instruction. Instead, the court instructed the jury as follows:

> A person is entrapped when that person has no previous disposition or willingness or intent to commit the crime charged and is induced by law enforcement officers to commit the offense.
>
> . . .
>
> [It is not] entrapment . . . for the Government merely to solicit to commit a crime.
>
> In determining the question of entrapment, you should consider all of the evidence received in this case concerning the intentions and disposition of the defendant before encountering the law enforcement officer, as well as the nature and the degree of the inducement provided by the law enforcement officer.

J.A. 1445-46. The court did not define inducement, nor did it give any examples of the type of conduct that could be considered inducement.

The Appellants contend that the district court, by refusing to give their requested instruction, prevented the jury from properly considering their defense because the court's instructions failed to adequately inform the jury about the different ways in which a defendant can be induced to commit a crime. *See United States v. Hicks*, 748 F.2d 854, 857 (4th Cir. 1984) ("[A] defendant is entitled to an instruction submitting to the jury any theory of defense for which there is a foundation in the evidence."); *United States v. Miller*, 658 F.2d 235, 237 (4th Cir. 1981) (The "district court's charge to the jury must be sufficiently precise to instruct the jury in the defendant's theory of defense." (internal quotation marks omitted)).

While "mild forms of persuasion" do not amount to inducement, *United States v. Daniel*, 3 F.3d 775, 779 (4th Cir. 1993), we agree with the Appellants that certain kinds of

persuasion or appeals to sympathy can be considered inducements for purposes of an entrapment defense. *See, e.g., United States v. Montanez*, 105 F.3d 36, 39 (1st Cir. 1997) ("By omitting [from its entrapment instruction] any 'sympathy' examples, the trial court may well have left the jury with the mistaken impression that coercion is a necessary element of entrapment and, in this case, such a misunderstanding could well have affected the outcome"); *United States v. Jackson*, 700 F.2d 181, 191 (5th Cir. 1983) (noting that to support an entrapment defense, "the government conduct must include an element of persuasion or mild coercion, such as . . . pleas based on need, sympathy, or friendship."). The instruction proposed by the Appellants, however, failed to explain to the jury that mild forms of persuasion cannot be considered inducement. To this extent, the Appellants' instruction was not a correct statement of the law, and the district court properly rejected it.

More importantly, however, we disagree with the Appellants' assertion that the instruction given by the district court was inadequate. While the instruction did not specifically state that inducement could be accomplished through "persuasion," neither did it limit inducement to coercion, which, according to the Appellants, was the thrust of the government's argument to the jury. Instead, the instruction required the jury to determine "the nature and the degree of the inducement" from all of the evidence presented at trial. J.A. 1446. The parties skillfully argued their views of the case during closing arguments, and the instruction gave the jury sufficient latitude to conclude that the government's actions amounted to inducement. Thus, the district court did not err by refusing to give the Appellants' requested instruction. *See Chaudhry v. Gallerizzo*, 174 F.3d 394, 408 (4th Cir.) ("The test of the adequacy of jury instructions is whether the jury charge, construed as a whole, adequately states the controlling legal principle without misleading or confusing the jury."), *cert. denied*, 120 S. Ct. 215 (1999).

Moreover, even if we were to conclude that the district court's inducement instruction was inadequate, that conclusion would not require reversal. "[T]he principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime." *Russell*, 411 U.S. at 433. Thus, even when the evidence clearly establishes that the government's actions induced the defendant to commit the crime, an entrapment defense fails if the defendant was predisposed to commit the crime. *See Jacobson*, 503 U.S. at 548-49; *see also United States v. Cervante*, 958 F.2d 175, 178 (7th Cir. 1992) ("The entrapment analysis ends without inquiry into government inducement if the defendant was predisposed to commit the charged conduct."); *United States v. Osborne*, 935 F.2d 32, 37 (4th Cir. 1991) ("[I]f the defendant's predisposition is established, the defense of entrapment may not be based on government misconduct."); *see also Brace*, 145 F.3d at 255 ("The Government acknowledges that it induced [the defendant] to launder money. Therefore, at issue is whether the evidence was sufficient to prove, beyond a reasonable doubt, that [the defendant] was predisposed to do so."). Thus, any error in the district court's instructions as to the government's inducement of Squillacote would be harmless if we can conclude that the jury could only have found that Squillacote was predisposed to commit the crimes with which she was charged. *See United States v. Hastings*, 134 F.3d 235, 241 (4th Cir. 1998) ("When, over a proper objection, a district court erroneously instructs the jury on an element of the offense, the error may be disregarded as harmless if a reviewing court can determine, beyond a reasonable doubt, that a correctly instructed jury would have reached the same conclusion."); *see also United States v. Jackson*, 72 F.3d 1370, 1378 (9th Cir. 1995) (concluding, under a plain error review, that a faulty entrapment instruction did not require reversal of the defendant's conviction because "the evidence virtually compels a finding that the defendant was predisposed"); *United States v. Jannotti*, 729 F.2d 213, 225 (3d Cir. 1984) (concluding that error in the district court's entrapment

instructions did not require reversal where the government presented overwhelming proof of the defendants' predisposition).[14]

In our view, the evidence of Squillacote's predisposition can only be described as overwhelming. The government's evidence established that Squillacote's involvement with the HVA went back almost twenty years. Through her East German contacts, Squillacote learned how to determine if she was being followed and how to evade those who might be following her, how to receive and decipher sophisticated coded messages, how to use the miniature document camera, and how best to remove any "classified" markings on documents. After the fall of East Germany, when Squillacote finally had a job that gave her access to sensitive information, Squillacote herself sought out opportunities to use these skills. She contacted David Truong, a convicted spy, in the hopes of establishing a new "connection," and she sent her fan letter to Kasrils, the South African official, hoping that he would "read between the lines." That Squillacote actively sought employment as a spy is powerful evidence that she was disposed to committing espionage well before the government first contacted her.

Squillacote's response to the government's phony Kasrils letter is also strong evidence of her predisposition. It is perhaps an understatement to say that Squillacote was ecstatic when she received the letter. When she received the letter, Squillacote called her brother to tell him about the letter. While laughing and crying, Squillacote said, "Michael, I did it. I did it Mike. All those years. All those years and I

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[14] The defense of entrapment "is not of a constitutional dimension." *Russell*, 411 U.S. at 433. Thus, as the Third Circuit noted in *Jannotti*, 729 F.2d at 225, it would seem that we would not be required to find any error in the district court's entrapment instructions harmless beyond a reasonable doubt, as we would with a constitutional error. *See Chapman v. California*, 386 U.S. 18 (1967). Nonetheless, even under the beyond-a-reasonable-doubt standard, we find any error to be harmless.

did it. I did it." J.A. 1893. To her husband Squillacote described the letter as "really, really, really, amazing," J.A. 1898. In fact, Squillacote was so excited when she received the letter that she even told her children about the impending meeting. *See* J.A. 1903. In another telephone conversation with her brother, Squillacote explained how proud she was that Kasrils had "read between the lines" of her letter. J.A. 1912.

Squillacote's predisposition to commit espionage is also evidenced by her statements to the undercover agent during their first meeting. In that meeting, the agent identified himself as being with the South African Intelligence Service, and he explained that "there are still operations being conducted without the full knowledge of everybody in the state, for reasons, I guess, you can well understand." J.A. 2189. Squillacote responded that "[t]his is an area that's not unfamiliar to me." J.A. 2190. Squillacote then elaborated that she had been associated with similar activities "in another kind of capacity" for many years, "so, you should understand that this is not a tabula rasa for me. I'm coming with a history." J.A. 2190. Squillacote described her covert activities as her "raison d'etre." J.A. 2212. When the undercover agent told Squillacote that he had "done some things that this government would consider to be illegal," J.A. 2238, Squillacote responded, "[b]een there," J.A. 2238, and she explained that she had "violated Federal eighteen, lots and lots."[15] J.A. 2239. In our view, these statements clearly show that Squillacote was more than willing, without any encouragement from the government, to commit espionage.

And perhaps the most compelling evidence of Squillacote's predisposition is related to the documents she passed to the undercover agent at their second meeting. The government's evidence established that Squillacote obtained

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[15] Given the context, it is apparent that this statement is a reference to Title 18 of the United States Code, which is entitled "Crimes and Criminal Procedure."

one of the documents sometime before her *first* meeting with the undercover agent, even though the phony Kasrils letter did not request, or even suggest, that Squillacote bring any classified materials to the meeting. And extra copies of two of the documents were found in Squillacote's home when the government executed its search warrant. Thus, even before she first met the undercover agent, Squillacote had already violated 18 U.S.C.A. § 793(b) by taking or copying classified national defense information. Clearer evidence of predisposition is difficult to imagine.

The evidence of Squillacote's predisposition was so strong that the jury could only conclude that Squillacote was predisposed to commit espionage. Therefore, even if the jury had been instructed on the actions that can be considered inducement and had concluded that the government in fact induced Squillacote to commit the crime, it still would have found Squillacote predisposed, thus making any finding of inducement legally irrelevant. *See Osborne*, 935 F.2d at 37 ("[I]f the defendant's predisposition is established, the defense of entrapment may not be based on government misconduct."). We therefore conclude beyond a reasonable doubt that, had the jury received a more thorough inducement charge, it still would have rejected her entrapment defense. Accordingly, any error in the district court's inducement instruction was harmless. *See Hastings*, 134 F.3d at 241.

(4)

The Appellants also contend that the district court erred when it gave an entrapment instruction that deviated from the charge the court had informed the parties it would give and to which the Appellants had tailored their closing arguments. We find no error.

Before closing arguments, the district court held a charge conference. As to the entrapment defense, the court stated

that it "plan[ned] to simply give the Devitt and Blackmar[16] instruction on entrapment." J.A. 1344. After the court rejected the Appellants' requested entrapment instructions, some of which have already been discussed in this opinion, the Appellants stated that they "would prefer the full '92 Devitt and Blackmar to the Government's proposed charge on entrapment." J.A. 1354. The court agreed to give the Devitt & Blackmar charge.

The Devitt & Blackmar entrapment instruction sought by the Appellants states, in relevant part:

> A defendant may not be convicted of this crime, however, if that person was entrapped by the government to the acts charged.
>
> A person is entrapped when that person has no previous intent or disposition or willingness to commit the crime charged and is induced *or persuaded* by law enforcement officers [or by their agents] to commit the offense.
>
> . . .
>
> In determining the question of entrapment, the jury should consider all of the evidence received in this case concerning the intentions and disposition of the defendant before encountering the law enforcement officers [or their agents] as well as the nature and the degree of the inducement *or persuasion* provided by the law enforcement officers [or their agents].

1 Devitt & Blackmar, § 19.04 (emphasis added).

The instructions actually given by the district court, however, were largely the government's proposed instructions, and the instructions deviated somewhat from the

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[16] *See* 1 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 19.04 (4th ed. 1992).

Devitt & Blackmar model instruction. The court did not include the introductory paragraph explaining that a defendant cannot be convicted if entrapped, and the district court did not include the words "persuaded" or "persuasion" in its charge. The Appellants contend that the district court violated Rule 30 of the Rules of Criminal Procedure when it deviated from the promised charge.

Rule 30 requires that the district court "inform counsel of its proposed action upon the requests [for specific jury instructions] prior to their arguments to the jury." Fed. R. Crim. P. 30. The purpose of the rule is "to require the district court to inform the trial lawyers in a fair way what the instructions are going to be in order to allow counsel the opportunity to argue the case intelligently to the jury." *United States v. Horton*, 921 F.2d 540, 547 (4th Cir. 1990) (internal quotation marks omitted). A violation of Rule 30 requires reversal only if the defendant can establish actual prejudice. *See id.*; *United States v. Burgess*, 691 F.2d 1146, 1156 (4th Cir. 1982).

Although we question whether the district court in fact violated Rule 30 by failing to deliver the Devitt & Blackmar instruction verbatim, we will nonetheless assume that a violation occurred. The question, then, is whether the Appellants suffered any prejudice.

The Appellants contend they were prejudiced by the district court's deviation from the Devitt & Blackmar charge because, based on their expectation that the persuasion language would be included, they argued persuasion to the jury and invited the jury to listen for persuasion in the court's entrapment instruction.[17] The Appellants contend that the

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[17] The Appellants also contend that by failing to include the opening paragraph of the Devitt & Blackmar instruction, the court failed to inform the jury that entrapment was a complete defense to the charges. This argument is without merit. The district court informed the jury that entrapment was asserted as a defense and that the government bore the burden of proving beyond a reasonable doubt that the Appellants were

district court's failure to give the expected jury instruction damaged their credibility with the jury, and effectively bolstered the government's credibility because the entrapment instructions discussed by the government during its closing were ultimately given by the district court. We disagree.

Although counsel for Appellants did mention persuasion in closing argument, the reference to the court's impending instructions was rather general.[18] There was no explicit promise that the court would define persuasion, nor was there any attempt by the attorney to define persuasion for the jury. In addition, although the government's closing argument did focus primarily on whether Squillacote was coerced into committing the crimes, the government also used the word "persuasion" in its discussion of the entrapment defense. Under these circumstances, we simply cannot conclude that the district court's deviation from the Devitt & Blackmar entrapment instruction damaged the Appellants' credibility in the eyes of the jury. Moreover, since we have already concluded that the overwhelming evidence of Squillacote's predisposition rendered harmless any error in the court's inducement instruction, we fail to see how the court's deviation from the Devitt & Blackmar could have otherwise prejudiced the Appellants.

Therefore, assuming that the district court violated Rule 30, we conclude that the Appellants were not prejudiced by the violation and that a new trial is not warranted.

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predisposed to committing the crimes. Viewing the charge as a whole, we conclude that the district court adequately instructed the jury as to the effect of the asserted defense. *See Chaudhry*, 174 F.3d at 408.

[18] Counsel argued that the undercover agent "knew perfectly well that being the first to offer money and being the first to propose an operational interest is exactly the kind of persuasion, and listen for the entrapment instruction, persuasion, that the law forbids." J.A. 1425.

(5)

Finally, Appellant Stand contends that the district court erred by denying his request for a jury instruction on what is generally referred to as "derivative entrapment." We find no error.

As a general rule, the defense of entrapment is applicable only in cases where *a government agent* induces the commission of a crime by a defendant who was not predisposed to commit the crime. Thus, there is no defense of private entrapment; a defendant who was induced to commit a crime by a private party, without any government involvement, cannot claim that he was entrapped. *See, e.g., United States v. Manzella*, 791 F.2d 1263, 1269 (7th Cir. 1986) ("There is no defense of private entrapment. Private entrapment is just another term for criminal solicitation, and outside the narrow haven created by the defense of necessity or compulsion, the person who yields to the solicitation and commits the solicited crime is guilty of that crime." (citation omitted)); *United States v. Burkley*, 591 F.2d 903, 911 n.15 (D.C. Cir. 1978) ("Persuasion, seduction, or cajoling by a private party does not qualify as entrapment even if the defendant was not predisposed to commit the crime prior to such pressure.").

However, in cases where there is some involvement by government agents, some circuits permit a defendant to raise a form of the entrapment defense often referred to as derivative entrapment.[19] While this Circuit has never used the term

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[19] The derivative entrapment defense has different formulations. In some circuits, a derivative entrapment defense may be raised only in cases where a government agent directs a private party to bring a specific person into a criminal scheme. *See United States v. Washington*, 106 F.3d 983, 996 (D.C. Cir. 1997) (per curiam); *United States v. Murphy*, 852 F.2d 1, 6 (1st Cir. 1988). Other circuits recognize a broader formulation of the defense, allowing entrapment to be asserted by a defendant who was induced to commit the crime by an intermediary who had been induced by a government agent, even if the government agent did not direct the

"derivative entrapment" in a published opinion, our case law makes it clear that the defense is not available.

In *United States v. Dove*, 629 F.2d 325 (4th Cir. 1980), Gene Baker cooperated with the FBI to "cultivate contacts and develop information about the trafficking of stolen automobiles." *Id.* at 326. Baker ingratiated himself with George Hutto, and Baker and Hutto participated in several sales of stolen cars. Baker also helped Hutto steal heavy equipment by teaching Hutto how to operate the equipment and providing the means to transport the stolen equipment. Hutto negotiated two separate sales of bulldozers to David Dove and Robert Johnston, and Baker, the government agent, was present during both transactions. On appeal, Dove and Johnston contended that they were entrapped. The court quickly disposed of the argument, stating that "only the inducements of government agents . . . give rise to an entrapment defense. Dove and Johnston were induced to purchase the bulldozers by Hutto. Baker's involvement as a silent partner in the transaction does not change the essential 'private entrapment' nature of this argument." *Id.* at 329; *see also United States v. Conti*, 336 F.2d 856, 859-60 (4th Cir. 1964) (rejecting entrapment defense asserted by defendant who claimed he was brought into the illegal venture by "the continued insistence and pleading" of an intermediary who was associated with a government agent, because the intermediary was not a government agent and did not know he was working with a government agent); *Crisp v. United States*, 262 F.2d 68, 69 (4th Cir. 1958) (per curiam). These cases make it clear that, in the Fourth Circuit, a defendant cannot claim an entrapment defense based upon the purported inducement of a third party who is not a government agent if the third party is not aware that he is dealing with a government agent. *Accord Thickstun*, 110 F.3d at 1398;

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intermediary to bring the defendant into the scheme. *See Hollingsworth*, 27 F.3d at 1204; *United States v. Valencia*, 645 F.2d 1158, 1168 (2d Cir. 1980).

United States v. Martinez, 979 F.2d 1424, 1432 (10th Cir. 1992). The district court, therefore, committed no error by refusing to give the requested instruction.

B.

The Appellants also contend that the district court erred when it determined that the evidence established only a single conspiracy and thus refused to give the Appellants' requested multiple-conspiracy instruction. We disagree.

"A multiple conspiracy instruction is not required unless the proof at trial demonstrates that appellants were involved *only* in separate conspiracies *unrelated* to the overall conspiracy charged in the indictment." *United States v. Kennedy*, 32 F.3d 876, 884 (4th Cir. 1994) (first emphasis added) (internal quotation marks omitted). "A single conspiracy exists where there is one overall agreement, or one general business venture. Whether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals." *United States v. Leavis*, 853 F.2d 215, 218 (4th Cir. 1988) (citations and internal quotation marks omitted).

The government's evidence established that Squillacote, Stand, and Clark were involved in a single conspiracy to compromise information related to this country's national defense. Stand, who was recruited by Ziemer, recruited both Clark and Squillacote. Ziemer was the primary handler for Stand, Squillacote, and Clark, and the three received largely the same training and used the same methods of communicating with their East German contacts. After the collapse of East Germany, the three continued their relationships with Ziemer, which expanded to include the KGB. With the knowledge of the other conspirators, Squillacote also sought to develop new contacts with others who might be interested in what the group had to offer. Stand was aware of Squillacote's letter to Kasrils, as well as her meetings with the undercover agent. In fact, Stand helped Squillacote remove the classified markings from the

documents she provided to the agent. Clark was likewise aware of the letter she wrote to Kasrils, and Squillacote sought to involve Stand, Clark, and Ziemer in the operation after she was contacted by the undercover agent.

In our view, this evidence is more than sufficient to support the finding of a single conspiracy. That Squillacote, Stand, and Clark were not always aware of the others' activities is part of the standard operating procedure for those engaged in espionage and would not prevent the jury from determining that a single conspiracy existed. *See United States v. Banks*, 10 F.3d 1044, 1054 (4th Cir. 1993) ("[O]ne may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence."); *United States v. Johnson*, 54 F.3d 1150, 1154 (4th Cir. 1995) (concluding that evidence established a single conspiracy even if the members of the conspiracy did not know each other or had limited contact with each other).

While it is possible that Squillacote's South African foray could be viewed as separate from the original conspiracy, it was certainly closely related to the conspiracy charged in the indictment, a conspiracy in which the evidence overwhelmingly established the involvement of Squillacote and Stand. Therefore, because the evidence did not establish that the Appellants were involved "only in 'separate conspiracies unrelated to the overall conspiracy charged in the indictment,'" *Kennedy*, 32 F.3d at 884, the district court properly refused to instruct the jury on multiple conspiracies. *See id.*[20]

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[20] The Appellants make much of Clark's testimony on cross-examination that he did not have an agreement with the Appellants to commit espionage, that he lost contact with the Appellants for a several years in the late 1970s and early 1980s, and that he was not involved in the South African effort. Given that Clark pleaded guilty to the charge that he conspired with the Appellants to commit espionage, it seems unlikely that the jury would have found this testimony particularly persuasive. In any

Moreover, even if the evidence in this case warranted a multiple conspiracy instruction, the district court's failure to give the instruction amounts to reversible error only if the Appellants can establish that they were "prejudiced by the variance between the single conspiracy charged in the indictment and the multiple conspiracies proven at trial." *Id.* at 884 n.1 (internal quotation marks omitted). "In order to show actual prejudice stemming from a multiple conspiracy variance, an appellant must prove that there are so many defendants and so many separate conspiracies before the jury that the jury was likely to transfer evidence from one conspiracy to a defendant involved in an unrelated conspiracy." *Id.* at 883 (internal quotation marks omitted).

This case was relatively straightforward, at least as straightforward as an espionage case can ever be. It involved a small number of conspirators engaged in a limited number of illegal activities. Thus, we do not believe that there was any likelihood that the jury transferred evidence from one defendant to another defendant involved in an unrelated conspiracy. Moreover, the evidence of multiple conspiracies was so weak when compared to the evidence establishing a single conspiracy that we are convinced the jury would have convicted the Appellants on the conspiracy charge even if a multiple-conspiracy instruction had been given. *See United States v. Tipton*, 90 F.3d 861, 883 (4th Cir. 1996) (explaining that to find prejudice from the failure to instruct the jury on multiple conspiracies, an appellate court "would have to conclude that the evidence of multiple conspiracies was so strong in relation to that of a single conspiracy that the jury probably would have acquitted on the conspiracy count had it been given a cautionary multiple-conspiracy instruction."). Because the Appellants cannot show that they were

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event, to accept this argument would require us to consider only Clark's testimony and to ignore the other evidence tending to show the existence of a single conspiracy or multiple, but still related, conspiracies, which of course we cannot do at this stage of the proceedings.

prejudiced by the district court's refusal to instruct the jury on multiple conspiracies, any error must be considered harmless.

C.

Finally, the Appellants contend that the district court improperly defined "information relating to the national defense" when instructing the jury. We find no error.

The Appellants were convicted of violating 18 U.S.C.A. § 793(b) and 18 U.S.C.A. § 794(a) and (c). In relevant part, these statutes prohibit the obtaining or copying of documents "connected with the national defense," 18 U.S.C.A. § 793(b), and conspiracies to or attempts to transmit documents or information "relating to the national defense," 18 U.S.C.A. § 794(a).

According to the Appellants, information that is available to the public can never be considered national defense information. Thus, the Appellants requested that the court instruct the jury as follows:

> The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness. The information need not be classified information under security criteria as long as you determine that the information has a reasonable and direct connection with our national defense. If, however, the information is lawfully accessible to anyone willing to take pains to find, to sift, and to collate it, you may not find that the defendant is guilty under this section. *Only information relating to our national defense which is not available to the public at the time of the claimed violation falls within the prohibition of this section.*

J.A. 1645 (emphasis added).

The district court, however, refused to give the Appellants' instruction, and instead gave the instruction requested by the government. That instruction stated, in pertinent part, that the government

> must prove that the material is closely held by the United States government.
>
> Where the information has been made public by the United States government and is found in sources . . . lawfully available to the general public, it does not relate to the national defense.
>
> Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

J.A. 1435.

The Appellants contend that the district court's instructions improperly hinge the national defense determination solely on the government's actions. The Appellants argue that the proper inquiry is whether the information is available to the general public, regardless of who made the information available. The Appellants presented evidence of the public availability of information similar to some of the information contained in the documents passed by Squillacote to the undercover agent. Thus, if the Appellants are correct, the instruction given by the district court would have prevented the jury from properly considering this evidence.

The government, however, contends that the district court's instruction was correct. According to the government, an espionage conviction can be based upon the transmission of information closely held by the government, even if some form of that information is available to the public, perhaps as the result of an unreliable "leak." The government points out that the Appellants were convicted of attempting to transmit

national defense *documents*, rather than just national defense *information*. According to the government, official government documents carry with them an imprimatur of legitimacy and authenticity. Thus, even if speculative information similar to that contained in a document appears in the press, that should not prevent a conviction based upon the unauthorized release of the document itself. The government therefore contends that the district court properly instructed the jury that closely held information must be made available to the public by the government before it loses its status as national defense information.

The statutes at issue unfortunately provide no guidance on the question of what kind of information may be considered related to or connected with the national defense. The task of defining "national defense" information thus has been left to the courts.

The Supreme Court considered the possible limitations on national defense information in *Gorin v. United States*, 312 U.S. 19 (1941). *Gorin* involved sections one and two of the Espionage Act of 1917, the predecessor to the statutes at issue here. The defendants in *Gorin* argued that national defense information under the Espionage Act must be limited to information related to the places and things specified in section I(a) of the Espionage Act.[21] According to the *Gorin* defendants, failure to so limit the Act rendered it unconstitutionally vague and infringed "upon the traditional

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[21] Section 1(a) of the Espionage Act prohibited entering into, flying over, or "otherwise obtain[ing] information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defense," if those actions were for the purpose of obtaining national defense information intended to be used "to the injury of the United States, or to the advantage of any foreign nation." *Gorin*, 312 U.S. at 21 n.l. Section 793(a) contains essentially identical language.

freedom of discussion of matters connected with national defense which is permitted in this country." *Id.* at 23.

The Supreme Court rejected this argument, and adopted the government's definition of national defense as "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." *Id.* at 28. The Court concluded that the Act's requirement that the information be intended to be "used to the injury of the United States, or to the advantage of any foreign nation" provided a sufficient limitation on the reach of the Act:

> This [language] requires those prosecuted to have acted in bad faith. The sanctions apply only when scienter is established. *Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government.*

Id. (emphasis added).

In *United States v. Heine*, 151 F.2d 813 (2nd Cir. 1945), the Second Circuit further considered the question of whether an espionage conviction can be based upon the dissemination of publicly-available information. In Heine, the defendant, during the early stages of World War II, provided a German corporation with reports about the aviation industry in the United States. All of the information provided by the defendant "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it." *Id.* at 815. Relying on *Gorin*, the court concluded that the dissemination of information that the government had never kept secret could not support an espionage conviction:

> [I]t is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction

> between such information, and information which the services have never thought it necessary to withhold at all. There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information about the same bombers, contained in an official report, or procured by a magazine through interviews with officers. The services must be trusted to determine what information may be broadcast without prejudice to the "national defense," and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter .... Information relating to the national defense," whatever else it means, cannot therefore include that kind of information, and so far as Heine's reports contained it, they were not within the section.

Id. at 816. The court, therefore, reversed the defendant's conviction on the espionage count. *Id.* at 817.

Thus, under *Gorin* and *Heine*, the central issue is the secrecy of the information, which is determined by the government's actions. *See Gorin*, 312 U.S. at 28; *Heine*, 151 F.2d at 816. Under this analysis, the instructions given by the district court in this case were clearly correct, and properly focused the jury's attention on the actions of the government when determining whether the documents were related to the national defense. The Appellants contend, however, that cases from this Circuit have further restricted the definition of national defense information, thus rendering the instruction given by the district court insufficient.

In *United States v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978), the defendant was convicted under 18 U.S.C.A. § 793(f)(2) of failing to report the abstraction (by photographing) of a classified document related to the national defense. On appeal, this Court rejected the defendant's contention that section 793 was overbroad and thus violated the First and

Fourteenth Amendments. *Id.* at 39. The Court concluded that any overbreadth problem was cured by the district court's jury instructions, which provided that

> "Information about weapons, munitions of war and intelligence *which has been made public by Congress or the Department of Defense* and is found in sources lawfully available to the general public does not relate to the national defense.
>
> "Similarly, where the sources of information are lawfully available to the public, *and the United States and the Department of Defense have made no effort to guard such information*, the information itself does not relate to the national defense."

Id. at 39-40 (emphasis added).

Clearly, the instruction given in this case is completely consistent with the above-quoted instruction given in *Dedeyan*. However, the quoted portions of the *Dedeyan* instructions are not complete, as this Court noted in *Dedeyan* when it stated that the district court also "stated the proposition conversely." *Id.* at 40. Although our opinion in *Dedeyan* does not include the conversely-stated portion of the instruction, the Appellants appended to their Reply Brief that portion of the transcript of *Dedeyan's* trial containing the relevant instructions. The portion of the charge omitted from our opinion in Dedeyan explains to the jury when information can be considered "available to the public":

> [I]f information appears in *an official government document* that is closely held and on its face *represents the United States' own estimates of its strength and weaknesses* and its intelligence as to a potential enemy's strengths and weaknesses, and such *official estimates are not lawfully available to the public, the document is a source not available to the public.*

Although the Appellants believe this portion of the instruction supports their position, we conclude that it instead demonstrates the correctness of the district court's instruction.

As this instruction makes clear, there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy. When those estimates are included in an official document closely held by the government, those estimates carry with them the government's implicit stamp of correctness and accuracy. That our government believes the estimates to be correct in and of itself is a fact that would be highly valuable to other countries. While general, unofficial information about the same issues may be available in public sources, that information is merely speculative, and is no substitute for the government's official estimates. As the instruction in *Dedeyan* makes clear, a document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information) until the *official* information in that document is lawfully available. Thus, as the government argues, mere leaks of classified information are insufficient to prevent prosecution for the transmission of a classified document that is the official source of the leaked information.

Such an approach to cases involving the compromise of documents is consistent with the Supreme Court's decision in *Gorin*, in which the Court concluded that the required level of scienter could not be established in cases "[w]here there is no occasion for secrecy." *Gorin*, 312 U.S. at 28. The approach is likewise consistent with the Second Circuit's analysis in *Heine*. *See* 151 F.2d at 816. And contrary to the Appellants' contention, the approach is likewise consistent with subsequent cases from this Circuit.

In *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980),[22] this court rejected the defendants' arguments that the information at issue in that case did not relate to national defense. *See id.* at 918. In a footnote, the court noted that the district court properly instructed the jury that "transmission of publicly available information did not fall within the statutory prohibitions," *id.* at 918 n.9, a proposition established in *Gorin*, *Heine*, and *Dedeyan*.

Truong, however, contains no discussion of the central issue here—that is, when can information contained in a closely-held document be considered publicly available—and it does not stand for the broad proposition urged by the Appellants that the presence in the public domain of snippets of unattributed and unverified information similar to that contained in official documents closely held by the government prevents a prosecution based on the transmission of the document itself.

To accept the Appellants' argument would effectively require the government to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information. Requiring that kind of "proof of a negative" would unduly hamper the government's ability to protect sensitive information and would render successful prosecutions in cases involving closely-held documents nearly impossible. *Cf. United States v. Richardson*, 30 M.J. 1239, 1244 (A.C.M.R. 1990) (per curiam) ("The appellant contends that evidence of record is insufficient to support his espionage conviction because there is no evidence of record that the information he conveyed to 'Vladimir' was not accessible to the public . . . . Contrary to the appellant's interpretation of the dicta in *Gorin* and the decision in *Heine*, the offense of espionage does not require proof of a negative averment.

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[22] It appears that the defendant in *Truong* is the David Truong approached by Squillacote in her efforts to make a new "connection."

These decisions stand for the simple proposition that an inference of bad faith on the part of the accused may not be justified where the 'national defense information' alleged in the charge is generally accessible to the public or has been published to the public at large by the United States government."), *rev'd on other grounds*, 33 M.J. 127 (C.M.A. 1991). The mere fact that similar but unofficial information is publicly available does not automatically remove information in closely-held documents from the realm of "national defense" information, as the Appellants' requested instruction suggests. *Truong's* shorthand summary of the instruction given in that case simply cannot be read as silently but yet so fundamentally changing the law as established in *Gorin*, *Heine*, and *Dedeyan*.

We reject the Appellants' reliance on *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988), for the same reason. In *Morison*, the defendant again challenged section 793 as unconstitutionally vague. This court again rejected that argument, concluding that the jury instructions defining wilfulness and national defense information were sufficient to overcome any vagueness problem. *See id.* at 1071-72. The national defense instruction given in *Morison* stated, in relevant part, that "the government must prove that the documents or the photographs are closely held in that [they] . . . have not been made public and are not available to the general public." *Id.* (ellipses and alteration in original). This instruction is consistent with *Gorin*, *Heine*, and *Dedeyan* in that it explains that information made public by the government as well as information never protected by the government is not national defense information. While the "not available to the general public" language of the charge could arguably provide some support for the Appellants' argument, we again decline to interpret this brief reference to the jury charge as silently working a fundamental change in the law.

Here, the district court instructed the jury that the information made public by the government could not be

considered national defense information, nor could publicly available information that the government has never protected. These instructions were consistent with the teachings of *Gorin*, *Heine*, and *Dedeyan*. Although the court did not give the additional Dedeyan instruction (which was not set out in this Court's opinion in Dedeyan), that instruction was not requested by either party, and its omission does not render improper the instructions given. We therefore reject the Appellants' challenge to the district court's national defense instructions.[23]

V.

After carefully reviewing the record and considering the arguments of the parties, we find no reversible error in the proceedings below. Accordingly, the convictions of the Appellants are hereby affirmed.

AFFIRMED

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[23] As previously discussed, the Supreme Court in *Gorin* concluded that the Espionage Act's scienter requirement sufficiently limited the reach of the Act so as to overcome the defendant's vagueness challenge. However, *Dedeyan*, *Truong*, and *Morison* focused on the jury instructions defining national defense information when rejecting the vagueness or overbreadth challenges, even though the Supreme Court in *Gorin* found no reversible error in the much more general national defense instructions that were given in that case. *See Gorin*, 312 U.S. at 30-31. To this extent, *Dedeyan*, *Truong*, and *Morison* arguably offer more protection to defendants than required by *Gorin*.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED September 8, 2000

No. 99-4088
CR-98-61

UNITED STATES OF AMERICA
Plaintiff - Appellee,

v.

THERESA MARIE SQUILLACOTE, a/k/a Tina, a/k/a Mary Teresa Miller, a/k/a The Swan, a/k/a Margaret, a/k/a Margit, a/k/a Margret, a/k/a Margrit, a/k/a Lisa Martin, a/k/a Resi, a/k/a Anne,
Defendant - Appellant.

No. 99-4089
CR-98-61

UNITED STATES OF AMERICA
Plaintiff - Appellee,

v.

KURT ALAN STAND, a/k/a Ken, a/k/a Junior, a/k/a Alan David Jackson
Defendant - Appellant.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this

Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX C

1. Section 793 of Title 18 of the United States Code provides:

§ 793. Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain, any sketch,

photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the

advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer--

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(h)(1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation. For the purposes of this subsection, the

term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p)) shall apply to--

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property, if not inconsistent with this subsection.

(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.

2. Section 794 of Title 18 of the United States Code provides:

§ 794. Gathering or delivering defense information to aid foreign government

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military

or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless the jury or, if there is no jury, the court, further finds that the offense resulted in the identification by a foreign power (as defined in section 101(a) of the Foreign Intelligence Surveillance Act of 1978) of an individual acting as an agent of the United States and consequently in the death of that individual, or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such

conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(d)(1) Any person convicted of a violation of this section shall forfeit to the United States irrespective of any provision of State law--

(A) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation, and

(B) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation.

For the purposes of this subsection, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c) and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(b), (c), and (e)-(p)) shall apply to--

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property, if not inconsistent with this subsection.

(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.

3. Section 1801 of Title 50 of the United States Code provides:

§ 1801. Definitions

As used in this subchapter:

(a) "Foreign power" means--

(1) a foreign government or any component thereof, whether or not recognized by the United States;

(2) a faction of a foreign nation or nations, not substantially composed of United States persons;

(3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;

(4) a group engaged in international terrorism or activities in preparation therefor;

(5) a foreign-based political organization, not substantially composed of United States persons; or

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means--

(1) any person other than a United States person, who--

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities

or knowingly conspires with any person to engage in such activities; or

(2) any person who--

(A) knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States;

(B) pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States;

(C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, or on behalf of a foreign power;

(D) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or

(E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

(c) "International terrorism" means activities that--

(1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal

violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended--

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

(d) "Sabotage" means activities that involve a violation of chapter 105 of Title 18, or that would involve such a violation if committed against the United States.

(e) "Foreign intelligence information" means--

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against--

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to--

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

(f) "Electronic surveillance" means--

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

(g) "Attorney General" means the Attorney General of the United States (or Acting Attorney General) or the Deputy Attorney General.

(h) "Minimization procedures", with respect to electronic surveillance, means--

(1) specific procedures, which shall be adopted by the Attorney General, that are reasonably designed in light of the purpose and technique of the particular surveillance, to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons consistent with the need of the United States to obtain, produce, and disseminate foreign intelligence information;

(2) procedures that require that nonpublicly available information, which is not foreign intelligence information, as defined in subsection (e)(1) of this section, shall not be disseminated in a manner that identifies any United States person, without such person's consent, unless such person's identity is necessary to understand foreign intelligence information or assess its importance;

(3) notwithstanding paragraphs (1) and (2), procedures that allow for the retention and dissemination of information that is evidence of a crime which has been, is being, or is about to be committed and that is to be retained or disseminated for law enforcement purposes; and

(4) notwithstanding paragraphs (1), (2), and (3), with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than twenty-four hours unless a court order under section 1805 of this title is obtained or unless the

Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.

(i) "United States person" means a citizen of the United States, an alien lawfully admitted for permanent residence (as defined in section 1101(a)(20) of Title 8), an unincorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States, but does not include a corporation or an association which is a foreign power, as defined in subsection (a)(1), (2), or (3) of this section.

(j) "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(k) "Aggrieved person" means a person who is the target of an electronic surveillance or any other person whose communications or activities were subject to electronic surveillance.

(l) "Wire communication" means any communication while it is being carried by a wire, cable, or other like connection furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

(m) "Person" means any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power.

(n) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication.

(o) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

4. Section 1802 of Title 50 of the United States Code provides:

§ 1802. Electronic surveillance authorization without court order; certification by Attorney General; reports to Congressional committees; transmittal under seal; duties and compensation of communication common carrier; applications; jurisdiction of court

(a)(1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that--

(A) the electronic surveillance is solely directed at--

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 1801(a)(1), (2), or (3) of this title; or

(ii) the acquisition of technical intelligence, other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title;

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 1801(h) of this title; and

if the Attorney General reports such minimization procedures and any changes thereto to the House

Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committees immediately of such minimization procedures and the reason for their becoming effective immediately.

(2) An electronic surveillance authorized by this subsection may be conducted only in accordance with the Attorney General's certification and the minimization procedures adopted by him. The Attorney General shall assess compliance with such procedures and shall report such assessments to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence under the provisions of section 1808(a) of this title.

(3) The Attorney General shall immediately transmit under seal to the court established under section 1803(a) of this title a copy of his certification. Such certification shall be maintained under security measures established by the Chief Justice with the concurrence of the Attorney General, in consultation with the Director of Central Intelligence, and shall remain sealed unless--

(A) an application for a court order with respect to the surveillance is made under sections 1801(h)(4) and 1804 of this title; or

(B) the certification is necessary to determine the legality of the surveillance under section 1806(f) of this title.

(4) With respect to electronic surveillance authorized by this subsection, the Attorney General may direct a specified communication common carrier to--

(A) furnish all information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy

and produce a minimum of interference with the services that such carrier is providing its customers; and

(B) maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished which such carrier wishes to retain.

The Government shall compensate, at the prevailing rate, such carrier for furnishing such aid.

(b) Applications for a court order under this subchapter are authorized if the President has, by written authorization, empowered the Attorney.[1] General to approve applications to the court having jurisdiction under section 1803 of this title, and a judge to whom an application is made may, notwithstanding any other law, grant an order, in conformity with section 1805 of this title, approving electronic surveillance of a foreign power or an agent of a foreign power for the purpose of obtaining foreign intelligence information, except that the court shall not have jurisdiction to grant any order approving electronic surveillance directed solely as described in paragraph (1)(A) of subsection (a) of this section unless such surveillance may involve the acquisition of communications of any United States person.

5. Section 1804 of Title 50 of the United States Code provides:

§ 1804. Applications for court orders

(a) Submission by Federal officer; approval of Attorney General; contents

Each application for an order approving electronic surveillance under this subchapter shall be made by a Federal officer in writing upon oath or affirmation to a judge having

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[1] So in original. Probably should be "Attorney".

jurisdiction under section 1803 of this title. Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter. It shall include--

(1) the identity of the Federal officer making the application;

(2) the authority conferred on the Attorney General by the President of the United States and the approval of the Attorney General to make the application;

(3) the identity, if known, or a description of the target of the electronic surveillance;

(4) a statement of the facts and circumstances relied upon by the applicant to justify his belief that--

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(5) a statement of the proposed minimization procedures;

(6) a detailed description of the nature of the information sought and the type of communications or activities to be subjected to the surveillance;

(7) a certification or certifications by the Assistant to the President for National Security Affairs or an executive branch official or officials designated by the President from among those executive officers employed in the area of national security or defense and appointed by the President with the advice and consent of the Senate--

(A) that the certifying official deems the information sought to be foreign intelligence information;

(B) that the purpose of the surveillance is to obtain foreign intelligence information;

(C) that such information cannot reasonably be obtained by normal investigative techniques;

(D) that designates the type of foreign intelligence information being sought according to the categories described in section 1801(e) of this title; and

(E) including a statement of the basis for the certification that--

(i) the information sought is the type of foreign intelligence information designated; and

(ii) such information cannot reasonably be obtained by normal investigative techniques;

(8) a statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance;

(9) a statement of the facts concerning all previous applications that have been made to any judge under this subchapter involving any of the persons, facilities, or places specified in the application, and the action taken on each previous application;

(10) a statement of the period of time for which the electronic surveillance is required to be maintained, and if the nature of the intelligence gathering is such that the approval of the use of electronic surveillance under this subchapter should not automatically terminate when the described type of information has first been obtained, a

description of facts supporting the belief that additional information of the same type will be obtained thereafter; and

(11) whenever more than one electronic, mechanical or other surveillance device is to be used with respect to a particular proposed electronic surveillance, the coverage of the devices involved and what minimization procedures apply to information acquired by each device.

(b) Exclusion of certain information respecting foreign power targets

Whenever the target of the electronic surveillance is a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the application need not contain the information required by paragraphs (6), (7)(E), (8), and (11) of subsection (a) of this section, but shall state whether physical entry is required to effect the surveillance and shall contain such information about the surveillance techniques and communications or other information concerning United States persons likely to be obtained as may be necessary to assess the proposed minimization procedures.

(c) Additional affidavits or certifications

The Attorney General may require any other affidavit or certification from any other officer in connection with the application.

(d) Additional information

The judge may require the applicant to furnish such other information as may be necessary to make the determinations required by section 1805 of this title.

6. Section 1805 of Title 50 of the United States Code provides:

§ 1805. Issuance of order

(a) Necessary findings

Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that--

(1) the President has authorized the Attorney General to approve applications for electronic surveillance for foreign intelligence information;

(2) the application has been made by a Federal officer and approved by the Attorney General;

(3) on the basis of the facts submitted by the applicant there is probable cause to believe that--

(A) the target of the electronic surveillance is a foreign power or an agent of a foreign power: *Provided*, That no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power;

(4) the proposed minimization procedures meet the definition of minimization procedures under section 1801(h) of this title; and

(5) the application which has been filed contains all statements and certifications required by section 1804 of this title and, if the target is a United States person, the certification or certifications are not clearly erroneous on

the basis of the statement made under section 1804(a)(7)(E) of this title and any other information furnished under section 1804(d) of this title.

(b) Specifications and directions of orders

An order approving an electronic surveillance under this section shall--

(1) specify--

(A) the identify, if known, or a description of the target of the electronic surveillance;

(B) the nature and location of each of the facilities or places at which the electronic surveillance will be directed;

(C) the type of information sought to be acquired and the type of communications or activities to be subjected to the surveillance;

(D) the means by which the electronic surveillance will be effected and whether physical entry will be used to effect the surveillance;

(E) the period of time during which the electronic surveillance is approved; and

(F) whenever more than one electronic, mechanical, or other surveillance device is to be used under the order, the authorized coverage of the devices involved and what minimization procedures shall apply to information subject to acquisition by each device; and

(2) direct--

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified communication or other common carrier, landlord, custodian, or other specified person furnish the applicant forthwith all

information, facilities, or technical assistance necessary to accomplish the electronic surveillance in such a manner as will protect its secrecy and produce a minimum of interference with the services that such carrier, landlord, custodian, or other person is providing that target of electronic surveillance;

(C) that such carrier, landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the surveillance or the aid furnished that such person wishes to retain; and

(D) that the applicant compensate, at the prevailing rate, such carrier, landlord, custodian, or other person for furnishing such aid.

(c) Exclusion of certain information respecting foreign power targets

Whenever the target of the electronic surveillance is a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, and each of the facilities or places at which the surveillance is directed is owned, leased, or exclusively used by that foreign power, the order need not contain the information required by subparagraphs (C), (D), and (F) of subsection (b)(1) of this section, but shall generally describe the information sought, the communications or activities to be subjected to the surveillance, and the type of electronic surveillance involved, including whether physical entry is required.

(d) Duration of order; extensions; review of circumstances under which information was acquired, retained or disseminated

(1) An order issued under this section may approve an electronic surveillance for the period necessary to achieve its purpose, or for ninety days,

whichever is less, except that an order under this section shall approve an electronic surveillance targeted against a foreign power, as defined in section 1801(a)(1), (2), or (3) of this title, for the period specified in the application or for one year, whichever is less.

(2) Extensions of an order issued under this subchapter may be granted on the same basis as an original order upon an application for an extension and new findings made in the same manner as required for an original order, except that an extension of an order under this chapter for a surveillance targeted against a foreign power, as defined in section 1801(a)(5) or (6) of this title, or against a foreign power as defined in section 1801(a)(4) of this title that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no communication of any individual United States person will be acquired during the period.

(3) At or before the end of the period of time for which electronic surveillance is approved by an order or an extension, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(e) Emergency orders

Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that--

(1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and

(2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists;

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than twenty-four hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of twenty-four hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.

(f) Testing of electronic equipment; discovering unauthorized electronic surveillance; training of intelligence personnel

Notwithstanding any other provision of this subchapter, officers, employees, or agents of the United States are authorized in the normal course of their official duties to conduct electronic surveillance not targeted against the communications of any particular person or persons, under procedures approved by the Attorney General, solely to--

(1) test the capability of electronic equipment, if--

(A) it is not reasonable to obtain the consent of the persons incidentally subjected to the surveillance;

(B) the test is limited in extent and duration to that necessary to determine the capability of the equipment;

(C) the contents of any communication acquired are retained and used only for the purpose of determining the capability of the equipment, are disclosed only to test personnel, and are destroyed before or immediately upon completion of the test; and:

(D) *Provided*, That the test may exceed ninety days only with the prior approval of the Attorney General;

(2) determine the existence and capability of electronic surveillance equipment being used by persons not authorized to conduct electronic surveillance, if--

(A) it is not reasonable to obtain the consent of persons incidentally subjected to the surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to determine the existence and capability of such equipment; and

(C) any information acquired by such surveillance is used only to enforce chapter 119 of Title 18, or section 605 of Title 47, or to protect information from unauthorized surveillance; or

(3) train intelligence personnel in the use of electronic surveillance equipment, if--

(A) it is not reasonable to--

(i) obtain the consent of the persons incidentally subjected to the surveillance;

(ii) train persons in the course of surveillances otherwise authorized by this subchapter; or

(iii) train persons in the use of such equipment without engaging in electronic surveillance;

(B) such electronic surveillance is limited in extent and duration to that necessary to train the personnel in the use of the equipment; and

(C) no contents of any communication acquired are retained or disseminated for any purpose, but are destroyed as soon as reasonably possible.

(g) Retention of certifications, applications and orders

Certifications made by the Attorney General pursuant to section 1802(a) of this title and applications made and orders granted under this subchapter shall be retained for a period of at least ten years from the date of the certification or application.

7. Section 1806 of Title 50 of the United States Code provides:

§ 1806. Use of information

(a) Compliance with minimization procedures; privileged communications; lawful purposes

Information acquired from an electronic surveillance conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No otherwise privileged communication obtained in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character. No information acquired from an electronic surveillance pursuant to this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) Statement for disclosure

No information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(c) Notification by United States

Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence,

notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.

(d) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof, against an aggrieved person any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(e) Motion to suppress

Any person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used or disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that--

(1) the information was unlawfully acquired; or

(2) the surveillance was not made in conformity with an order of authorization or approval.

Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(f) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority, shall, notwithstanding any other law, if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate security procedures and protective orders, portions of the application, order, or other materials relating to the surveillance only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.

(g) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (f) of this section determines that the surveillance was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from electronic surveillance of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the surveillance was lawfully authorized and conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(h) Finality of orders

Orders granting motions or requests under subsection (g) of this section, decisions under this section that electronic surveillance was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to a surveillance shall be final orders and binding upon all courts of the United States and the several States except a United States court of appeals and the Supreme Court.

(i) Destruction of unintentionally acquired information

In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.

(j) Notification of emergency employment of electronic surveillance; contents; postponement, suspension or elimination

If an emergency employment of electronic surveillance is authorized under section 1805(e) of this title and a subsequent order approving the surveillance is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to electronic surveillance as the judge may determine in his discretion it is in the interest of justice to serve, notice of--

(1) the fact of the application;

(2) the period of the surveillance; and

(3) the fact that during the period information was or was not obtained.

On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

8. Section 1824 of Title 50 of the United States Code provides:

§ 1824. Issuance of an order

(a) Necessary findings

Upon an application made pursuant to section 1823 of this title, the judge shall enter an ex parte order as requested or as modified approving the physical search if the judge finds that--

(1) the President has authorized the Attorney General to approve applications for physical searches for foreign intelligence purposes;

(2) the application has been made by a Federal officer and approved by the Attorney General;

(3) on the basis of the facts submitted by the applicant there is probable cause to believe that--

(A) the target of the physical search is a foreign power or an agent of a foreign power, except that no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) the premises or property to be searched is owned, used, possessed by, or is in transit to or

from an agent of a foreign power or a foreign power;

(4) the proposed minimization procedures meet the definition of minimization contained in this subchapter; and

(5) the application which has been filed contains all statements and certifications required by section 1823 of this title, and, if the target is a United States person, the certification or certifications are not clearly erroneous on the basis of the statement made under section 1823(a)(7)(E) of this title and any other information furnished under section 1823(c) of this title.

(b) Specifications and directions of orders

An order approving a physical search under this section shall--

(1) specify--

(A) the identity, if known, or a description of the target of the physical search;

(B) the nature and location of each of the premises or property to be searched;

(C) the type of information, material, or property to be seized, altered, or reproduced;

(D) a statement of the manner in which the physical search is to be conducted and, whenever more than one physical search is authorized under the order, the authorized scope of each search and what minimization procedures shall apply to the information acquired by each search; and

(E) the period of time during which physical searches are approved; and

(2) direct--

(A) that the minimization procedures be followed;

(B) that, upon the request of the applicant, a specified landlord, custodian, or other specified person furnish the applicant forthwith all information, facilities, or assistance necessary to accomplish the physical search in such a manner as will protect its secrecy and produce a minimum of interference with the services that such landlord, custodian, or other person is providing the target of the physical search;

(C) that such landlord, custodian, or other person maintain under security procedures approved by the Attorney General and the Director of Central Intelligence any records concerning the search or the aid furnished that such person wishes to retain;

(D) that the applicant compensate, at the prevailing rate, such landlord, custodian, or other person for furnishing such aid; and

(E) that the Federal officer conducting the physical search promptly report to the court the circumstances and results of the physical search.

(c) Duration of order extensions; review of circumstances under which information was acquired, retained, or disseminated

(1) An order issued under this section may approve a physical search for the period necessary to achieve its purpose, or for forty-five days, whichever is less, except that an order under this section shall approve a physical search targeted against a foreign power, as defined in paragraph (1), (2), or (3) of section 1801(a) of this title, for the period specified in the application or for one year, whichever is less.

(2) Extensions of an order issued under this subchapter may be granted on the same basis as the original order upon an application for an extension and new findings made in the same manner as required for

the original order, except that an extension of an order under this chapter for a physical search targeted against a foreign power, as defined in section 1801(a)(5) or (6) of this title, or against a foreign power, as defined in section 1801(a)(4) of this title, that is not a United States person, may be for a period not to exceed one year if the judge finds probable cause to believe that no property of any individual United States person will be acquired during the period.

(3) At or before the end of the period of time for which a physical search is approved by an order or an extension, or at any time after a physical search is carried out, the judge may assess compliance with the minimization procedures by reviewing the circumstances under which information concerning United States persons was acquired, retained, or disseminated.

(d) Emergency orders

(1)(A) Notwithstanding any other provision of this subchapter, whenever the Attorney General reasonably makes the determination specified in subparagraph (B), the Attorney General may authorize the execution of an emergency physical search if--

(i) a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or the Attorney General's designee at the time of such authorization that the decision has been made to execute an emergency search, and

(ii) an application in accordance with this subchapter is made to that judge as soon as practicable but not more than 24 hours after the Attorney General authorizes such search.

(B) The determination referred to in subparagraph (A) is a determination that--

(i) an emergency situation exists with respect to the execution of a physical search to obtain foreign

intelligence information before an order authorizing such search can with due diligence be obtained, and

(ii) the factual basis for issuance of an order under this subchapter to approve such a search exists.

(2) If the Attorney General authorizes an emergency search under paragraph (1), the Attorney General shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed.

(3) In the absence of a judicial order approving such a physical search, the search shall terminate the earlier of--

(A) the date on which the information sought is obtained;

(B) the date on which the application for the order is denied; or

(C) the expiration of 24 hours from the time of authorization by the Attorney General.

(4) In the event that such application for approval is denied, or in any other case where the physical search is terminated and no order is issued approving the search, no information obtained or evidence derived from such search shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof, and no information concerning any United States person acquired from such search shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General, if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1822 of this title.

(e) Retention of applications and orders

Applications made and orders granted under this subchapter shall be retained for a period of at least 10 years from the date of the application.

9. Section 1825 of Title 50 of the United States Code provides:

§ 1825. Use of information

(a) Compliance with minimization procedures; lawful purposes

Information acquired from a physical search conducted pursuant to this subchapter concerning any United States person may be used and disclosed by Federal officers and employees without the consent of the United States person only in accordance with the minimization procedures required by this subchapter. No information acquired from a physical search pursuant to this subchapter may be used or disclosed by Federal officers or employees except for lawful purposes.

(b) Notice of search and identification of property seized, altered, or reproduced

Where a physical search authorized and conducted pursuant to section 1824 of this title involves the residence of a United States person, and, at any time after the search the Attorney General determines there is no national security interest in continuing to maintain the secrecy of the search, the Attorney shall provide notice to the United States person whose residence was searched of the fact of the search conducted pursuant to this chapter and shall identify any property of such person seized, altered, or reproduced during such search.

(c) Statement for disclosure

No information acquired pursuant to this subchapter shall be disclosed for law enforcement purposes unless such

disclosure is accompanied by a statement that such information, or any information derived therefrom, may only be used in a criminal proceeding with the advance authorization of the Attorney General.

(d) Notification by United States

Whenever the United States intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from a physical search pursuant to the authority of this subchapter, the United States shall, prior to the trial, hearing, or the other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the United States intends to so disclose or so use such information.

(e) Notification by States or political subdivisions

Whenever any State or political subdivision thereof intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of a State or a political subdivision thereof against an aggrieved person any information obtained or derived from a physical search pursuant to the authority of this subchapter, the State or political subdivision thereof shall notify the aggrieved person, the court or other authority in which the information is to be disclosed or used, and the Attorney General that the State or political subdivision thereof intends to so disclose or so use such information.

(f) Motion to suppress

(1) Any person against whom evidence obtained or derived from a physical search to which he is an aggrieved person is to be, or has been, introduced or otherwise used or

disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the evidence obtained or derived from such search on the grounds that--

(A) the information was unlawfully acquired; or

(B) the physical search was not made in conformity with an order of authorization or approval.

(2) Such a motion shall be made before the trial, hearing, or other proceeding unless there was no opportunity to make such a motion or the person was not aware of the grounds of the motion.

(g) In camera and ex parte review by district court

Whenever a court or other authority is notified pursuant to subsection (d) or (e) of this section, or whenever a motion is made pursuant to subsection (f) of this section, or whenever any motion or request is made by an aggrieved person pursuant to any other statute or rule of the United States or any State before any court or other authority of the United States or any State to discover or obtain applications or orders or other materials relating to a physical search authorized by this subchapter or to discover, obtain, or suppress evidence or information obtained or derived from a physical search authorized by this subchapter, the United States district court or, where the motion is made before another authority, the United States district court in the same district as the authority shall, notwithstanding any other provision of law, if the Attorney General files an affidavit under oath that disclosure or any adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the physical search as may be necessary to determine whether the physical search of the aggrieved person was lawfully authorized and conducted. In making this determination, the court may disclose to the aggrieved person, under appropriate

security procedures and protective orders, portions of the application, order, or other materials relating to the physical search, or may require the Attorney General to provide to the aggrieved person a summary of such materials, only where such disclosure is necessary to make an accurate determination of the legality of the physical search.

(h) Suppression of evidence; denial of motion

If the United States district court pursuant to subsection (g) of this section determines that the physical search was not lawfully authorized or conducted, it shall, in accordance with the requirements of law, suppress the evidence which was unlawfully obtained or derived from the physical search of the aggrieved person or otherwise grant the motion of the aggrieved person. If the court determines that the physical search was lawfully authorized or conducted, it shall deny the motion of the aggrieved person except to the extent that due process requires discovery or disclosure.

(i) Finality of orders

Orders granting motions or requests under subsection (h) of this section, decisions under this section that a physical search was not lawfully authorized or conducted, and orders of the United States district court requiring review or granting disclosure of applications, orders, or other materials relating to the physical search shall be final orders and binding upon all courts of the United States and the several States except a United States Court of Appeals or the Supreme Court.

(j) Notification of emergency execution of physical search; contents; postponement, suspension or elimination

(1) If an emergency execution of a physical search is authorized under section 1824(d) of this title and a subsequent order approving the search is not obtained, the judge shall cause to be served on any United States person named in the application and on such other United States persons subject to the search as the judge may determine in his discretion it is in the interests of justice to serve, notice of--

(A) the fact of the application;

(B) the period of the search; and

(C) the fact that during the period information was or was not obtained.

(2) On an ex parte showing of good cause to the judge, the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed 90 days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

APPENDIX D

UNCLASSIFIED

To: WF From: NSD
Re: **[BLACKOUT] 08/16/1996**

NATIONAL SECURITY DIVISION (NSD)
BEHAVIORAL ANALYSIS PROGRAM (BAP) TEAM
REPORT
LOFTIEST SHADE
00: WMFO

JUNE 20, 1996

I. BACKGROUND: (U)

On 06/20/1996, the NSD held a BAP Team meeting to discuss the above-captioned matter. **[BLACKOUT]**

The purpose of the BAP Team meeting was to examine the personality of the captioned subject (code name LOFTIEST SHADE [LS]), and based on this examination, to provide suggestions concerning an interview strategy or operational scenarios that could be used in furthering the objective of this investigation - - to obtain evidence regarding the subject's espionage activity.

The summary of subject's background (Section I), behavioral analysis of the subject (Section II)[1] and BAP suggestions for the case Agents (Section III) detailed below are based upon an assessment of the subject derived from a review of FBI files, analysis of surveillance tapes (both audio and visual), third party psychological tests of LS, and

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[1] **[BLACKOUT]**

discussions with operational personnel involved in the investigation.

(a) Summary of Subject's Background: (U)

The subject[2] is a U.S. citizen and Government employee who was recruited as an agent of the former East German Intelligence Service (EGIS) in 1981 and continues to be operational. **[BLACKOUT]** to include the subject, her spouse, and an associate of theirs, are under full investigation by WMFO. The triad is generally aware of each others' past espionage activities, and LS and her spouse are in frequent contact with their associate. In July, 1995, LS forwarded a letter to a South African official in which she possibly offered to work for the South African Intelligence Service. The subject is also in contact with two other individuals (her brother and a high-school teacher in the Washington, D.C. area) who are also aware of her espionage activity.

LS was reared in Wisconsin in a large middle to upper middle class family. Her mother is deceased. LS has a close relationship with her father, a former labor judge who recently remarried. LS has an intense dislike of her stepmother. The subject has two sisters and one brother. An older sister's suicide about two years ago was devastating for the subject. She is very close to her brother -- they travel together and confide in each other. She has resided in Washington, D.C. since 1980, when she began law school.

LS was awarded a Masters Degree and a Bachelors Degree from the University of Wisconsin at Milwaukee, and a Law Degree from the Columbus School of Law at The Catholic University of America in Washington, D.C. During her attendance at the University of Wisconsin at Milwaukee,

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[2] Born November 10, 1957 in Chicago, Illinois, LS is 5'0" and weighs 140 pounds. Her ethnicity is Italian, Polish and Ukrainian. She has a prosthetic right limb from her knew cap down and is missing several fingers and toes. This may be attributed to her mother taking thalidomide during her pregnancy.

she was one of the main activists in the Progressive Student Forum. She enjoys political and philosophical arguments, and wants to win; she attempts to change the opinion of anyone who disagrees with her. LS socializes with her friends from her college days by going to see a play or a movie, and she also enjoys going to a bar with them.

LS currently works as an attorney or the U.S. Department of Defense, in the office of the Deputy Undersecretary of Defense, Acquisition Reform at the Pentagon. She strongly detests being at the pentagon and refers to it as a "concrete bunker." LS likes to "run her own show" at work, but she maintains the facade of following the orders of her supervisor. Her co-workers have told her to "straighten up" prior to meetings; she is unkempt and has body odor. She has previously worked for the National Labor Relations Board and briefly for the U.S. House of Representatives Armed Services Committee.

The subject has been married to her husband since 1983. Her spouse is the Regional Secretary for the International Union of Food and Allied Services. They have a 12-year-old son and a ten-year-old daughter. Their son had encephalitis and is a slow learner. The interior of the family home resembles a construction site since it is under constant repair, and the closets are so full they are unusable.

Approximately five years ago, LS separated from her spouse and children and rented an apartment. The family reunited a year later. She ignores and neglects her children; her clandestine activities take precedence in her life. The children take care of themselves after school and are left with friends during long weekends so their parents can go away. After she had an argument with her children she went to her office. Her children telephoned her and cried that they wanted her to come home, and she replied that, "It is not enough." When she gets angry with them she walks out and later returns. She has no tolerance for lack of obedience.

LS walks with a limp due to her prosthetic right limb. She flaunts her handicap by wearing clothing that highlights her limb, and she takes offense when someone makes a joke about handicapped people. She suffers from cramps and depression and is taking the anti-depressants Zoloft and Diserel. She may also be using marijuana and cocaine. The subject's family has been beset with depression: her mother was prone to depression; her sister committed suicide; and her brother is taking anti-depressants.

LS has wide mood swings. When things are going her way, on her own agenda, she laughs, is very upbeat, and is full on energy. When she feels as though she is losing control and is under stress (which is the majority of the time), she became hysterical, sobs, and screams. When she has been under a great deal of stress, she has reported that she has the sensation of falling off a cliff. The subject's personality characteristics are often associated with those of individuals willing to die for a cause rather than be exposed as another "unstable" individual.

She has dependent, childish relationships with men. Her spouse has a calmative effect on her; he is perpetually mellow, never raises his voice, and provides the subject with unconditional positive regard.

Subject's life for the past ten to 15 years has revolved around her German handler. She had been personally committed to him and became very dependent on him. When the handler broke off their relationship in May, 1996 she said, "This was Daddy telling me that I was a bad girl. . . I was subject to Party discipline -- being punished." The subject has been in a state of grief and "hurt" since her handler cut off their relationship. She compared the ending of this relationship to the death of her mother. In addition, there are several instances in which she has referred to her husband as "Daddy."

It is believed that in July, 1995, she forwarded a letter to the South African Deputy Minister of Defense and received a

reply from him in the form of a Christmas card in February, 1996. She was ecstatic at the response and the prospect of working for a handler who would appreciate her.

II. BEHAVIORAL ANALYSIS: (U)

> It should be noted that behavioral assessment is as much an art form as a science because the nature of the interaction between people and situations often produces results that are unpredictable. The analysis is an opinion, and must be interpreted by those with intimate knowledge of the case in light of current facts or information concerning the subject. (U)

(a) Personality Characteristics: (U)

This person reflects a cluster of personality characteristics often loosely referred to as "emotional and dramatic." She needs constant attention and approval. She reacts to life events in a dramatic, over-emotional fashion, calling attention to herself at every opportunity, because she needs to be the center of attention of those whom she has chosen to be her friends.[3] She is totally self-centered and impulsive. She has no concern for applying logic to thought or argument about long-term issues such as ethics, loyalty or most other moral reasoning. Because of the above traits, it is most likely that she will be easily persuaded if an approach is made to her that plays more to her emotions. Specifically, several important aspects in an approach to her should include:

> Timing - She will likely grieve for about one year for her "lost" (former) East German contact. This is an important time period in which it is possible to take advantage of her emotional vulnerability.

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[3] Although she is not really capable of friendship in a normal fashion (her friends are defined as those people who will provide adulation and who can be easily manipulated).

Who approaches her - The type of UCA who approaches her will be very important. She will respond to a 'type" of person who possesses the same qualities of dedication and professionalism as her last contact (although probably not necessarily any physical resemblance).

The structure of the UCA's pitch to her - The new contact will provide some "praise" for her efforts, but will, like the old contact, tend to be professional and a bit aloof.

She appears to sustain better relationships with men than with women. There are two reasons for this. First, she simply does not like women as much because she cannot exploit or manipulate women as well as some men. Second, she appears to possess the mind of a newly pubescent child, tending to seek an "idealized" relationship with men who are not able, for various reasons, to respond to her. That is, "unrequited" love is one of her better methods of express the drama so necessary in her life.

Because this type of person is given to dramatic and impulsive gestures, in addition to her ongoing treatment for depression, it is possible that once she has been arrested she will make a suicide attempt. Generally, in cases like hers, the attempts are merely gestures designed to show her "audience" that she is "remorseful." Sadly, they often underestimate the lethality of the attempt and actually kill themselves. Therefore, it would be prudent at the appropriate time to advise individuals close to her (i.e. her husband, brother, and attorney) of the potential danger.

(b) Interpretation of **[BLACKOUT]** Test[4]

(1) General Observations: (U)

[BLACKOUT]

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[4] **[BLACKOUT]**

The two domains that are the most notable about this person are the very low levels of Agreeableness, and Conscientiousness that characterize her failures in her interactions with others. She was seen overall as cynical, highly egocentered (thoughtless of others), and generally antagonistic in her dealings with others. She was somewhat lacking in character (low willingness to apply high moral values to her daily decision process). That is, she was willing to apply whatever values were expedient to satisfy her desires for the moment, having no long term goals, and being rather hedonistic. Additionally, her high scores in the Neuroticism domain suggested that she was thin-skinned, sensitive to criticism, and that she possessed poor impulse control. Her response to stress were probably more emotional, than rational. She was seen as quite unsociable, keeping to herself (and why not; she was not a particularly likeable person). She was considered to have average intelligence, imagination, and curiosity about the things happening in the world around her.

More specifically, considering each facet of the domains observed, **[BLACKOUT]** described her as follows. She was cynical, dishonest, manipulative, self-centered, and competitive (rather than cooperative) in her dealings with others. Her basic means of defending herself from the world was to appear to others as arrogant or conceited. She was, however, considered somewhat realistic in her decision-making process. Confronted with unpleasant facts, she would try to avoid dealing with the consequences by being unpleasant. But, she was likely to accept the facts and act accordingly.

The observers had a low opinion of the subject's abilities. They considered her inept, unprepared, and not very productive in her work and daily activities. She was a person who appeared to them to be someone who made snap decisions, and who would quit easily if she met resistance of any sort.

She was observed to be anxious, uptight, easily discouraged, and sensitive to any criticism about her behavior,

probably seeing criticism (whether well-meaning or not) as ridicule. This subject was capable of strong anger, and may have expressed it readily, because she was unable to cope well with stress.

She tended to be a loner, not possessing much warmth in her interpersonal relationships. She was considered as reserved, not liking people and not willing to show much regard for others. She would not tend to seek much social contact, given the choice. She was considered as normally assertive, capable of speaking up when necessary, and as being a sort of person who does crave some excitement in her life. In spite of all the above negative comments, this person was seen as somewhat happy with herself.

She possessed an active imagination, average intelligence, and normal affect (she was observed to exhibit a normal range of emotions, and would likely not tend to hide her feelings).

III. SUGGESTIONS -- POINTS TO CONSIDER:

It is believed that a false flag approach against LS will be more productive than simultaneous interviews of the espionage ring. The following scenario has been developed based upon an analysis of the subject's personality, and includes suggestions designed to exploit her narcissistic and histrionic characteristics.[5] It is believed that LS will be susceptible to an approach through her mail drop based on her recent rejection by her long-term German handler, and her thrill at receiving a Christmas card from the South African official.

Because LS seems to crave excitement in her life, a personal false flag approach should be used against the

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[5] The subject's narcissistic traits include a grandiose sense of self-importance: a lack of empathy; and an expectation of special treatment. She possesses the histrionic traits of being excessively emotional and consistently seeking reassurances, approval, and praise.

subject. This may be initiated by placing a letter[6] in her own post office box from the object of her adulation in South African who will tell her he is sending a personal emissary from the South African Intelligence Service to visit her. The letter could indicate that LS is to meet her handler in New York City for the weekend.

Site of False Flag Approach: (U)

The letter could state that the meet will take place at the Waldorf-Astoria Hotel in Manhattan. She should be instructed to travel a circuitous route to New York City from Washington, D.C. This should add a sense of excitement and intrigue to the scenario.

Strategy: (U)

An undercover Special Agent (UCA), acting as an emissary for the South African Intelligence Service, should conduct the false flag. The Agency should be a mature male (a father figure), and should portray himself as an "out-of-towner."[7] He might be depicted as the son of a couple who left South Africa in the late 1940s or early 1950s. This is not unusual, given the large exodus of Communists from South Africa during this period.[8]

In order to capitalize on her fantasies and intrigue, the UCA should make a friendly overture to the subject by

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[6] The BAP field representatives can assist the case Agent in crafting the letter.

[7] The UCA would have more control of the relationship by being available only periodically (i.e., she would be unable to call him frequently, etc.).

[8] Under South Africa's Suppression of Communism Act of 1950, Communism was defined in such sweeping terms that it empowered the government to declare unlawful any organization or publication is regarded as subversive. It was also used to "ban" individuals listed as Communists from membership in any organization or attendance at any public gathering. (U)

bringing her a personal gift such as a biography, which is her favorite type of book. The UCA would act professional and somewhat aloof yet responsive to her moods. The initial meet should be brief and leave LS beguiled and craving more attention.

Bona Fides:

The UCA's bona fides can be established on the basis of his general knowledge of an exchange of correspondence between the subject and the South African official. The UCA does not need to know all the specifics of the correspondence, nor should he be personally acquainted with the South African. In his letter to the subject, the UCA may wish to direct the subject to bring that letter with her to their meeting to establish her bona fides.

Themes:

The nature of the first meeting dictates that the UCA show some caution with regard to his operational interests. Rather, he should elicit from the subject the extent of her willingness to covertly assist the South African Intelligence Service. Money should not be discussed at this meeting unless this topic in initiated by the subject. Appeals to the subject for her assistance should be based on their shared desire to advance the "New South Africa" being built by the ANC dominated government.

Subsequent Meets: (U)

The UCA should maintain a low-key but intriguing relationship by building on issues related to South Africa and by emphasizing the subject's personal investment. Subsequent meets should take place in expensive restaurants. She should be asked what she thinks but not be allowed to dominate either conversation or meetings. Once the subject becomes dependent on the UCA, then she can be encouraged to talk about her previous contacts and associates to determine the extent of her current and past espionage activity (i.e.,

"Give me an excuse to continue seeing you." And "Are there others who can help us?").

Interview of Subject: (U)

It is recommended that two female FBI Agents subsequently interview the subject before her arrest.[9] The approach should be matter-of-fact businesslike (i.e., "I need you to talk about this.") rather than appealing to her emotions. The subject has a propensity to view males as father figures, and if two females interview her, there would be no "Daddy" figure to which she could appeal, and less of an opportunity for the subject to attempt to avoid difficult questions.

Miscellaneous:

The BAP is available to assist the case investigators in the future if the need arises. (U)

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[9] [Illegible]

IA Thomas M. Chmelovski
WMFO
May 3, 1996

SOLEMN TOUCHES SUMMARY

CALL INFO: 5/2/96 Thursday 2031 Hours INCOMING CALL
SYMBOL NUMBER: WF-16692-S TAPE NUMBER: 96-85-18
RECORDER NUMBER: 85
FROM: Apud, Dr. Jose
TO: Stand, Kurt
FILE NUMBER(S): 65A-WF-194047

STAND	Hello
DR. A.	Yes, good evening. May I talk to Mr. KURT STAND?
STAND	Speaking.
DR. A.	Yes, good afternoon. This is DR. APUD.
STAND	Okay, yes.
DR. A.	I'm a psychiatrist, and I just saw your wife.
STAND	Yea.
DR. A.	Yea. I talked with her and suggested that I talk with you, and she agreed with that.
STAND	Okay.
DR. A.	So I'm just going to give you some feedback about what we discussed when I saw your wife. Just to make a long story short, I'll tell you, she's now suffering from a moderate to severe depression. There are a lot of symptoms which suggest that. I'm concerned about her lack of sleep, and losing weight, and being very depressed. But more than anything else, she feels that she has some thoughts, or she doesn't feel safe with herself. She's not

basically saying that she's going to kill herself, but she mentioned that she asked you to keep an eye on her.

STAND Right.

DR. A. Of course, the other issue she brought into the therapy session, is that of her sister . . . .

STAND Oh, okay.

DR. A. It happened at age 39, which is very close to her age now.

STAND That's true.

DR. A. And we have to be very concerned about the meaning of this; her depression at this time and the meaning of her (unintelligible). I gather that she may have something at the back of her mind, but she's got it confused, because the depression is very difficult for her to put these thoughts into words. I would say that we have to be very careful with that. I told her that I was going to ask you to keep a serious eye on her, and she agreed with that. I started her on medication now. She's on a (unintelligible), and normally it would take ten days to a couple of weeks to start kicking in. But always the first week, the first two weeks is very (unintelligible) with the medication.

STAND In terms of taking it on a regular basis? Or possible side effects?

DR. A. Not only that, those are two issues . . . . I mean I think she is going to be complying with the medication. She really wants it badly, the medication, so she can deal with the depression. And I explained to her about the side effects (unintelligible), but the medication I gave to her is somewhat activating, and some

people, you know, when they feel a little bit more activated and they have (unintelligible) to hurt themselves.

STAND Okay.

DR. A. So that's why especially the first week is very important to keep a close eye on her. If she can take some leave from her work would be better, and she can stay with someone all the time. That would be the best thing to do.

STAND In a way then, she's better at work than at home, because otherwise she would sit by herself.

DR. A. Okay, yea. I'll leave it up to your judgment then. If she can still work, and if she doesn't feel overwhelmed by work, that would be okay. But it's important that always someone keep an eye on her. Probably (unintelligible) take a couple of weeks to really start feeling really better. She may start having some effects, what we call the placebo effect, but within two or three weeks she may feel better. But it's more the acute effect with the medication that's kicking in and she may feel a bit more energetic. But the depression is still going to be there. The other thing is that she has been taking Myquil to help her with sleep. I told her not to take it because sometime it interacts with the medication.

STAND Oh, okay. Is there anything she can take?

DR. A. Yea, I gave her some Deceral. Deceral is an anti-depressant which when used at low doses is a sedative. And it also may help her with the depression. Because she will be taking in the morning Zoloft, which she agreed to take that when I gave her different possibilities, and she

agreed to take that, probably because her brother is taking it. She feels more comfortable with it. And at night she will take the Deceral. First half a tablet, if she sleeps well, then she will keep half a tablet at night. If it doesn't work very well, then she can take up to one tablet.

STAND Okay.

DR. A. She has my card number, and my phone number. So she can call the office, and they can give her a beeper number where she can call me or you can call me anytime.

STAND Okay. Would it make sense for me to come see you at some point, or ....

DR. A. Well, what I'm doing is basically managing the medication. She's been seen by Dr. Titell, that's the therapist. So probably she'll have to decide what's the best thing for you. Probably down the line a couple of therapy would help a lot. But at this time I think the most important issue is her depression, and the medication will take care of that, unless she (intelligible) can't take care of decisions and dealing with other issues, that she may feel more comfortable at that time when the depression is (unintelligible).

STAND Right, sure, okay.

DR. A. Do you have any questions for me, or anything?

STAND Just, are there any negative side effects that I should be watching for with the medication?

DR. A. Well, she told me that she is very sensitive to medication. So for the first two days, I started her with half a dose, which is a half tablet of

Zoloft. Normally, this medication may produce some irritability, maybe some jerkiness at times, maybe some abdominable discomfort. But very seldom, not so much. But it's more the abdominal discomfort. She may have some insomnia, and that's why I gave her the other medication to take care of that. These are mostly the things you'll have to look for. She mentioned also that she has some headaches.

STAND Right, migraines.

DR. A. Migraines, yea. It's interesting that migraines headaches started at the time where she became a little bit depressed, a year ago. So I don't know if these migraine headaches had something to do with her depression or not. This medication sometimes may produce some headaches. But persons whose headaches are related to depression get better. So we'll just have to keep an eye on that. If she starts feeling some mild headaches, she can take some Advil, a couple of tablet, 400 milograms, twice or three time a day, and that normally helps. But there are no major side effects, but some people are more subject to them than others. And then the restlessness (unintelligiable) because activating the medication, but she's in low dose, so I don't expect her to have too many side effects at this time.

STAND Okay. And she's going to see you again in two weeks?

DR. A. Well, I'll see her again in one week.

STAND In one week, okay.

DR. A. And if things are okay, then I'll see her first every two weeks, then once a month, for as long as its needed. While she's stable on the medication, then I see her once a month or so.

STAND I see, okay.

DR. A. And I told her that she'll have to take the medication for at least six months, at least. Normally this goes up to one year, because of the fact of the depression.

STAND Okay.
(they then conclude)

IA Thomas M. Chmelovski
WMFO
May 3, 1996

SOLEMN TOUCHES SUMMARY

CALL INFO: 5/2/96 Thursday 1428 Hours INCOMING CALL
SYMBOL NUMBER: WF-16692-S TAPE NUMBER: 96-85-18
RECORDER NUMBER: 85
FROM: Titell, Dr. Raquell Titell
TO: Squillacote, Theresa
FILE NUMBER(S): 65A-WF-194047

After exchanging greetings:

SQUILL I wanted to ask something about . . . well, I talked to my brother yesterday, and he's being taking this Voloft.

RAQ He's been taking what?

SQUILL *I have it written own somewhere else, Voloft. It's a post-Prozac. It's a next generation. . .*

RAQ Oh, a medication, okay.

SQUILL Just like for, he's been pretty much in a depressed mode for some time, and he's been really pleased with the effect that it's had. And the thing is that he's a chemistry professor, he teaches at Auburn, he's had an opinion that there very well may be some bio-chemical issues with our family, especially on my mom's side.

RAQ Well now there is a lot in genetics kind of factor.

SQUILL Yea, well with my sister's suicide and my mom's tendency to depression, and I think that

it would be fair to say that my brother and I would have something of a depressive, we get depressed. . .

RAQ Pretty easily.

SQUILL Yea. And he was thinking if this seratin, and what this does is to control the level of seratin.

RAQ In the brain.

SQUILL Yea.

RAQ He does feel better?

SQUILL Yea, he does feel better. And it's also helping his migraines. And I've been having really bad migraines the last year or so. And I didn't know...I'm frankly finding it, in fact I'm home now instead of at work, ...

RAQ See I called them in the morning.

SQUILL Yea, well we had some school meetings. But this business of trying to make the separation is very difficult for me. And I just generally found it extremely difficult to execute.

RAQ Right.

SQUILL And that's very important in my life, that I be able to do that. And I don't know. . . . I don't know how to evaluate whether or not this would be helpful for me and I thought I would ask you about it.

RAQ Umm, I think that, you know medication is certainly not my specialty. So I would advise you. . . . if I were in your place and I would have those kinds of doubts, I would want to have an opinion of somebody that has medicated a lot. Somebody in psychopharmatology, a psychiatrist, that had medicated a lot and that has seen results. And

that on the basis of their results, they could tell you.

SQUILL Because I remember that once before you had wanted me (unintelligible).

RAQ Yes. I didn't feel that now you was in the same . . .

SQUILL I don't feel, I don't feel as clinically depressed as I was then, but I don't want to reach that point.

RAQ No, I see it as a preventative kind of thing. Also, if you have decisions to take, and you know beforehand (unintelligible) happy.

SQUILL Yea.

RAQ Because some kinds of decisions do not help.

SQUILL Yea.

RAQ Well, do you have somebody?

SQUILL No. Do you have a reference?

RAQ Let me, let me think through of who would be good.

SQUILL Okay.

RAQ . . . . in psychopharmacology. Because there are many people I know, and they tend not to medicate.

SQUILL There was a gentleman you sent me too a long time ago in Virginia.

RAQ And how was it?

SQUILL It was okay.

RAQ Well, why don't you go back to him?

SQUILL Yea, what was his name?

RAQ Hirschman.

SQUILL	Hirschman, yea.
RAQ	Right. Let me see. I might have the telephone number right here. If not, I can . . . . Well, he certainly medicates.
SQUIL	Yea.
RAQ	Yea.
SQUIL	Just generally, when do you think it's....well you just described when you think it could be appropriate or not.
RAQ	Yea. Let me see. Here, I do have it. It's 703-560-0050. (unintelligible) from the point of medication, he could be quit judicious.
SQUILL	Okay. (They then conclude)

ENGLISH

1 - 65A-WF-194047 Sub EL1

2 - CI-7

1 - CI-1 Log

1 - LS Copy

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December 1, 2000
VIA FACSIMILE AND MAIL
Christine Gunning
U.S. Department of Justice
Security & Emergency Planning Staff
10th & Pennsylvania Avenue, N.W.
Washington, DC 20530

Re: United States v. Squillacote and Stand

Dear Ms. Gunning:

This is in follow-up to our conversation on November 29, 2000.

On behalf of our client, Mr. Stand, this is to advise you that we will be filing a Petition for Writ of Certiorari in the United States Supreme Court in the above-referenced matter no later than December 7, 2000. In support of the Petition, we respectfully request the Department of Justice, as custodian of the classified material in this case, to provide to the Clerk of the Supreme Court copies of the applications and supporting materials (including any affidavits) provided by the government to the Foreign Intelligence Surveillance Court ("FISC") pursuant to the Foreign Intelligence Surveillance Act ("FISA"), as well as the resulting FISC surveillance orders, with respect to Mr. Stand and co-defendant Ms. Squillacote. More specifically, we are asking you to provide to the Supreme Court the precise same FISA information which you provided to the United States Court of Appeals for

the Fourth Circuit in connection with our client's appeal to that Court, as referenced in the last paragraph on page 12 and the first paragraph on page 13 of the Fourth Circuit's August 11, 2000 opinion in this case.

As I mentioned, we intend to include this letter request in the Appendix to the Petition we file next week.

I am authorized to make this request on behalf of Mayer, Brown & Platt, representing Ms. Squillacote, as we contemplate filing a joint Petition to the Supreme Court.

Thank you for your assistance. Please contact me if you have any questions.

Sincerely,

/s/ Douglas W. Baruch

cc: Lee H. Rubin, Esq.

218680.1

Supreme Court, U.S.
FILED
MAR 14 2001
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No. 00-969

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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35 pp.

QUESTIONS PRESENTED

1. Whether the government is barred from making derivative use of conversations allegedly protected by the evidentiary privilege for psychotherapist-patient communications.

2. Whether the district court improperly defined the terms "connected with the national defense" and "relating to the national defense" for purposes of 18 U.S.C. 793 and 794 (1994 & Supp. IV 1998).

3. Whether the court of appeals erred in upholding the validity of the government's applications for authorization to conduct electronic surveillance and physical searches under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, without disclosing the applications and the related materials to the defense.

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In the Supreme Court of the United States

No. 00-969

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 221 F.3d 542.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2000. A petition for rehearing was denied on September 8, 2000 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on December 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners Theresa Marie Squillacote and Kurt Alan Stand were convicted on one count of conspiring to transmit documents and infor-

mation relating to the national defense, in violation of 18 U.S.C. 794(a) and (c) (Count 1); one count of attempting to transmit documents and information relating to the national defense, in violation of 18 U.S.C. 794(a) and 2 (Count 3); and one count of obtaining documents connected with the national defense, in violation of 18 U.S.C. 793(b) and 2 (Count 4). Squillacote was also convicted on one count of making false statements, in violation of 18 U.S.C. 1001 (1994 & Supp. IV 1998) (Count 5). Squillacote was sentenced to 262 months' imprisonment to be followed by five years' supervised release. Stand was sentenced to 210 months' imprisonment to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-66a; Gov't C.A. Br. 2-4.

1. Squillacote and her husband, Stand, along with their friend, co-conspirator James Clark, are citizens of the United States who, over the course of decades, conspired to commit espionage against the United States on the behalf of various foreign powers. They began as agents of the German Democratic Republic (East Germany). Their handler was Lothar Ziemer, an officer with East Germany's foreign intelligence agency, commonly known as the HVA. By the early 1970s, Stand was working as an HVA agent for Ziemer. Stand recruited Clark to be an HVA agent in 1976, and Squillacote to be an HVA agent between 1979 and 1981. Pet. App. 3a.

The HVA provided the three conspirators with extensive training on such matters as detecting and avoiding surveillance, receiving and decoding messages sent by shortwave radio from Cuba, mailing and receiving packages through the use of "accommodation" addresses, using code words and phrases, using a miniature camera to photograph documents, and removing classified markings from documents. The conspirators received a substantial amount of money from

the HVA to fund their trips to other countries to meet with their handlers. Pet. App. 3a-4a.

On instructions from the HVA, the conspirators moved to Washington, D.C. Squillacote enrolled in, and graduated from, law school. She chose to specialize in government procurement law in order to gain "a certain level of access." She sought jobs that would place her in proximity to sensitive classified information. She used family connections to obtain a temporary position with the House Armed Services Committee. She also applied for various jobs involving access to classified national defense information with governmental agencies such as the Central Intelligence Agency and the National Security Agency. In 1991, she obtained a job as an attorney with the Department of Defense. She eventually became the Director of Legislative Affairs in the Office of the Undersecretary of Defense (Acquisition Reform), a position that required a security clearance and provided access to valuable information. Pet. App. 4a-5a; J.A. 2190.[1]

By the time Squillacote secured that position, however, East Germany had collapsed. The conspiracy nonetheless endured. Ziemer had begun to work for the KGB, the Soviet Union's intelligence agency. Ziemer maintained his relationships with Stand, Squillacote, and Clark, and they, too, became involved with the KGB. Pet. App. 5a.

In April 1992, Ziemer was arrested and subsequently convicted in Germany on charges relating to his intelligence activities with the KGB. After Ziemer's arrest, the three conspirators discussed the possibility of future intelligence

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[1] Clark, after obtaining a master's degree in Russian, also sought jobs that would give him access to classified information. He worked for a private company and later for the United States Army in positions that required him to obtain a security clearance. He succeeded in obtaining, through friends at the State Department, and delivering to the HVA many classified documents relating to the national defense. Pet. App. 4a; Gov't C.A. Br. 16.

work, perhaps for Vietnam or Cuba, and Squillacote expressed her interest in South Africa's Communist Party. In September 1992, after Ziemer was released from prison, the conspirators reestablished contact with him, discussing threats to their safety as well as potential espionage activities. In 1994, Squillacote approached David Truong, who had been convicted some years earlier of espionage on behalf of North Vietnam, as part of her search for "another connection," but the overture went nowhere. Pet. App. 5a-6a; Gov't C.A. Br. 23-26; J.A. 2290.[2]

In 1995, Squillacote procured a post office box in Baltimore, Maryland, under the alias "Lisa Martin." Using that alias, she wrote to Ronnie Kasrils, the Deputy Defense Minister of South Africa and a senior Communist Party official. She spent months composing the letter, which detailed her views on the collapse of socialism and the future of communism. She hoped that Kasrils would "read between the lines." Both Stand and Clark were aware of the letter. Pet. App. 6a; J.A. 1912.

In February 1996, Squillacote received a Christmas card from Kasrils, thanking her for "the best letter" that he had received in 1995. Squillacote and Stand were delighted to receive the note, and they began to think that a connection might be made. Squillacote began a second letter to Kasrils. Pet. App. 6a; J.A. 1675.

In September 1996, Squillacote found a letter from Kasrils in her Baltimore post office box. The letter invited her to a meeting in New York City with a representative of "our special components." Pet. App. 6a-7a; J.A. 1681.

Unbeknownst to the conspirators, however, the FBI had been investigating them for many years. Starting in January 1996, the FBI obtained authorization under the Foreign

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[2] "Connection" was a term used by the conspirators to refer to potential espionage partners. J.A. 1859.

Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. 1801 *et seq.*, to conduct clandestine surveillance on petitioners.[3] The surveillance included the monitoring of all conversations in their house as well as calls made to and from their house and Squillacote's office. From the surveillance data, the FBI's Behavioral Analysis Program Team constructed a report that analyzed Squillacote's emotional makeup and offered suggestions on how to tailor a "false flag" operation to "exploit her narcissistic and histrionic characteristics."[4] The September 1996 letter, although ostensibly from Kasrils, was actually written by the FBI as part of that operation. Pet. App. 7a-8a; J.A. 2064.

In October 1996, Squillacote met with the undercover FBI agent who was posing as a South African intelligence officer. Over the next year, she met with the undercover agent three additional times. Stand attended one of the meetings. Pet. App. 8a-9a.

On January 5, 1997, at their second meeting, Squillacote gave the undercover agent four classified documents that she had taken from the Department of Defense. The documents were: (1) "Defense Planning Guidance for Fiscal Year 1997 through 2001," a numbered document, classified "se-

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[3] FISA establishes a special Foreign Intelligence Surveillance Court, composed of seven federal district judges appointed by the Chief Justice, to review applications for authorization of electronic surveillance and physical searches aimed at obtaining foreign intelligence information. See 50 U.S.C. 1803. Each application to that court must be approved by the Attorney General. 50 U.S.C. 1804(a), 1823(a). The application must contain, among other things, a statement of reasons to believe that the target of the surveillance is a foreign power or an agent of a foreign power and a certification from a high-ranking executive branch official that the information sought is "foreign intelligence information" that cannot be obtained by other means. 50 U.S.C. 1804(a), 1823(a). See Pet. App. 12a.

[4] A "false flag" operation is ordinarily one in which an FBI undercover agent poses as a representative of a foreign intelligence service. See Gov't C.A. Br. 28.

cret," with restricted dissemination; (2) "Defense Planning Guidance Scenario Appendix for 1998 through 2003," a numbered document, classified "secret," which forbade reproduction or further dissemination without authorization; (3) "Defense Planning Guidance, Fiscal Years, 1996 through 2001, Final For Comment Draft," which was classified "secret," with restricted dissemination; and (4) "International Arms Trade Report September-October 1994," a CIA intelligence report on international arms trades, which was classified "secret," with restricted dissemination. Three of the documents were copies; the Scenario Appendix was an original. Although the undercover agent had never requested any documents or classified information, Squillacote stated that one day, when she and her secretary were alone in her office, she decided to "score what [she] could score." Pet. App. 9a; J.A. 509.[5]

Squillacote continued to meet with the undercover agent until she and Stand were arrested in October 1997. In a search of petitioners' home, authorities discovered a quantity of incriminating evidence, including espionage-related equipment and copies of two of the documents given to the undercover agent. Pet. App. 10a.

2. A federal grand jury returned a five-count indictment against the three conspirators. Count 1 charged Squillacote, Stand, and Clark with conspiring to transmit "writing[s and] information relating to the national defense" to East Germany, the Soviet Union, the Russian Federation, and South Africa, in violation of 18 U.S.C. 794(c). Count 2 charged Clark with transmitting documents relating to the national defense, in violation of 18 U.S.C. 794(a). Count 3 charged Squillacote and Stand with attempting to transmit "document[s] * * * relating to the national defense" to South Africa, in violation of 18 U.S.C. 794(a) and 2. Count 4

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[5] The four documents underlie most of the charges against petitioners.

charged Squillacote and Stand with obtaining classified documents and writings "connected with the national defense," in violation of 18 U.S.C. 793(b) and 2. Count 5 charged Squillacote with making false statements, in violation of 18 U.S.C. 1001 (1994 & Supp. IV 1998). Clark, after pleading guilty to Count 1, testified against petitioners at trial. Gov't. C.A. Br. 2; J.A. 88, 157-161.

Before trial, petitioners moved to suppress evidence derived from the FISA-authorized surveillance and searches. They contended that the FISA warrants were not supported by probable cause to believe that they were "agents of a foreign power" within the meaning of FISA. The Attorney General filed an affidavit, pursuant to 50 U.S.C. 1806(f) and 1825(g), stating that the district court should review the FISA materials ex parte and in camera because their disclosure would harm national security. The court found that the FISA applications were supported by probable cause. The court also ruled that petitioners were not entitled to disclosure of the FISA warrant applications or to an adversarial hearing on the matter. Pet. App. 14a-15a.

The district court also denied petitioners' request for a hearing to determine whether the government's evidence was derived from sources independent of two allegedly privileged conversations with psychotherapists that were intercepted during the FISA-authorized surveillance. The court ruled that the psychotherapist-patient privilege was not constitutionally based, and therefore that a taint analysis was inapplicable. Pet. App. 23a.

At the end of trial, the district court instructed the jury on the meaning of the terms "connected with the national defense" and "relating to the national defense," for purposes of 18 U.S.C. 793(b) and 794(a). The court explained that, "[t]o prove that documents, writings, photographs or information relate to the national defense, there are two

things that the Government must prove": first, that "the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States," and, second, that "the material is closely held by the United States government." J.A. 1435. Petitioners objected on the ground that the jury should have been instructed that material cannot "relate to the national defense" if it is available in the public domain. Pet. App. 57a-58a.

3. The court of appeals affirmed. Pet. App. 1a-66a.

First, the court of appeals upheld the validity of the FISA-authorized surveillance of petitioners. The court rejected petitioners' argument that the FISA warrants were invalid because there was no probable cause to believe that petitioners were agents of a foreign power. The court concluded, based on its de novo review of the relevant materials, that each of the more than 20 FISA applications "established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted, notwithstanding the fact that East Germany was no longer in existence when the applications were granted." Pet. App. 14a.

The court of appeals also ruled that the district court properly denied petitioners' request for disclosure of the FISA application materials. The court relied on 50 U.S.C. 1806(f), which requires an in camera and ex parte review of a FISA application where, as here, the Attorney General files an affidavit attesting that disclosure would harm national security and permits disclosure only when "necessary to make an accurate determination of the legality of the surveillance." The court explained that Section 1806(f) "clearly anticipates that an *ex parte*, *in camera* determination is to be the rule," and that "[d]isclosure and an adversary hearing are the exception, occurring only when necessary." The court concluded that no such necessity existed here because

"the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance." Pet. App. 15a.

Second, the court of appeals rejected petitioners' argument that, under *Kastigar* v. *United States*, 406 U.S. 441 (1972), the district court was required to conduct a hearing to determine whether the government's evidence was derived from sources independent of conversations between petitioners and psychotherapists that were intercepted during the FISA-authorized surveillance.[6] The court explained that "a *Kastigar* analysis is not triggered by the existence of evidence protected by a privilege, but instead by the government's effort to compel a witness to testify over the witness's claim of privilege." Pet. App. 24a. Because neither Squillacote nor Stand was compelled to give testimony, the court found that *Kastigar* was "not applicable to this case." *Id.* at 23a. The court further noted that the psychotherapist-patient privilege is simply an evidentiary rule, not a constitutional requirement, and that derivative evidence generally need not be suppressed for a non-constitutional violation. *Id.* at 26a-27a & n.8.

Third, the court of appeals upheld the district court's jury instruction on the meaning of materials "connected with the national defense" or "relating to the national defense" for purposes of 18 U.S.C. 793(b) and 794(a). The court explained that, in determining whether documents relate to the national defense, "the central issue is the secrecy of the information, which is determined by the government's actions." The court concluded that the district court's instruction "properly focused the jury's attention on the

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[6] As the court noted, one of the conversations at issue was between Stand and one of Squillacote's therapists. The court assumed that the conversation between Stand and the therapist was privileged, and, for convenience, referred to both conversations as having taken place between Squillacote and her therapists. Pet. App. 22a-23a n.7.

actions of the government when determining whether the documents were related to the national defense." Pet. App. 61a.

The court of appeals rejected petitioners' argument that information in official government documents does not relate to the national defense if it "is available to the general public, regardless of who made the information available." Pet. App. 58a. The court explained that "there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy"; thus, "[w]hen those estimates are included in an official document closely held by the government, those estimates carry with them the government's implicit stamp of correctness and accuracy," and are of a different character than "general, unofficial information about the same issues." *Id.* at 63a. Accordingly, the court concluded that "a document containing official government information relating to the national defense will not be considered available to the public (and therefore no longer national defense information), until the *official* information in that document is lawfully available." *Ibid.*[7]

ARGUMENT

1. Petitioners ask the Court to decide whether the government is barred from making derivative use of allegedly

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[7] The court of appeals also rejected other claims raised by petitioners. Although petitioners do not specifically renew their entrapment defense before this Court, petitioners continue to suggest (Pet. 6) that the government induced them to commit the charged offenses by tailoring a sting operation to "exploit[] [Squillacote's] unique psychiatric infirmities." As the court of appeals explained, that argument is "legally irrelevant," given the "overwhelming" evidence of Squillacote's predisposition to commit the crimes. Pet. App. 46a-48a; see *id.* at 48a (noting that Squillacote obtained one of the four classified documents before her first meeting with the undercover agent and concluding that "[c]learer evidence of predisposition is difficult to imagine").

privileged psychotherapist-patient communications that are intercepted during court-authorized electronic surveillance. Pet. 9-14. Neither this Court nor any other court of appeals has required the suppression of such derivative evidence (or a hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972)) in the circumstances of this case. There is not even any reason to conclude that any such derivative evidence was actually used in this case; as explained below (at 17-18), the record indicates the contrary. Petitioners' claim warrants no further review.[8]

During the FISA-authorized surveillance of petitioners, an FBI agent listened to and transcribed two short telephone conversations that occurred on May 2, 1996. One conversation was between Squillacote and one of her therapists; the other conversation was between Stand and another of Squillacote's therapists. See Pet. App. 119a-128a (transcripts of conversations).[9] The supervising FBI agent, upon learning of the conversations, ordered that no other conversation between petitioner and mental health providers be listened to, indexed, or transcribed. In accordance with those instructions, although six additional conversations between petitioners and various therapists were automatically intercepted, those conversations were not listened to or catalogued. The government did not introduce testimony about, or transcripts of, any patient-therapist conversations at petitioners' trial. But petitioners speculate that the government may have introduced evidence that was somehow derived from those conversations. See *id.* at 22a-23a; J.A. 354, 357.

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[8] This claim is relevant only to Squillacote. Stand does not have standing to challenge any violation of a privilege between Squillacote and her therapists.

[9] We assume for purposes of this discussion, as did the court of appeals (see Pet. App. 22a-23a n.7), that the conversation between Stand and Squillacote's therapist was privileged.

a. This Court has recognized in other contexts that, where the government has obtained information in violation of a rule that is not itself constitutionally compelled, the government is not precluded from making derivative, as opposed to direct, use of the information in a criminal case. Put differently, the Court has not extended the "fruit of the poisonous tree" doctrine beyond evidence obtained in violation of the Constitution.

In *Wong Sun* v. *United States*, 371 U.S. 471 (1963), the Court held that evidence discovered as an indirect result of a search in violation of the Fourth Amendment had to be suppressed as "fruit of the poisonous tree," unless the government could demonstrate that the evidence was obtained "by means sufficiently distinguishable [from the illegality] to be purged of the primary taint." *Id.* at 488. The Court has applied *Wong Sun*'s "fruit of the poisonous tree" doctrine to other constitutional violations. See, *e.g.*, *United States* v. *Wade*, 388 U.S. 218 (1967); *Harrison* v. *United States*, 392 U.S. 219, 222-223 (1968). The Court has also made clear, however, that the doctrine that evidence must be excluded as "'fruit of the poisonous tree' assumes the existence of a constitutional violation." *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985). Thus, the Court held that the doctrine does not apply to the "fruits" of statements obtained without administering the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), because those warnings, while serving to protect Fifth Amendment rights, are not themselves constitutionally compelled. See *Elstad*, 470 U.S. at 308 ("Since there was no actual infringement of [Elstad's] constitutional rights, the case was not controlled by the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed."); accord *Michigan* v. *Tucker*, 417 U.S. 433, 445 n.19 (1974); cf. *Dickerson* v. *United States*, 120 S. Ct. 2326, 2335 (2000) (discussing *Elstad*).

The psychotherapist-patient privilege is not constitutionally required. It is an evidentiary rule that protects communications between a patient and a psychotherapist from being introduced in a judicial proceeding. See *Jaffee* v. *Redmond*, 518 U.S. 1, 15 (1996); Fed. R. Evid. 501. Such "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that the public . . . has a right to every man's evidence," and therefore "must be strictly construed." *Trammel* v. *United States*, 445 U.S. 40, 50 (1980) (internal quotation marks and citations omitted). The psychotherapist-patient privilege does not extend beyond the protected communication to include other evidence that is not, in itself, protected from disclosure. Thus, the court of appeals correctly held that "the suppression of any evidence derived from the privileged conversations would [not] be proper in this case, given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a.[10]

b. Petitioners contend (Pet. 10-11) that decisions of the Second, Third, and Seventh Circuits conflict with the Fourth

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[10] Other courts of appeals have suggested, consistent with the Fourth Circuit here, that a breach of a non-constitutional evidentiary privilege is not subject to the "fruit of the poisonous tree" doctrine. See, *e.g.*, *Nickel* v. *Hannigan*, 97 F.3d 403, 409 (10th Cir. 1996) ("declin[ing] to apply the 'fruit of the poisonous tree' doctrine to the possible breach of attorney-client privilege" in a state habeas case where state law did not require exclusion of all evidence derived from a breach of that privilege), cert. denied, 520 U.S. 1106 (1997); *United States* v. *Marashi*, 913 F.2d 724, 731 n.11 (9th Cir. 1990) (observing in dictum that "no court has ever applied [the 'fruit of the poisonous tree'] theory to *any* evidentiary privilege," such as the marital communications privilege at issue there, and "we have indicated we would not be the first to do so"); *United States* v. *Lefkowitz*, 618 F.2d 1313, 1318 n.8 (9th Cir.) (rejecting contention that marital communications privilege was "constitutionally grounded" and consequently expressing "doubt" that information derived from a violation of that privilege "would in any way be 'tainted'"), cert. denied, 449 U.S. 824 (1980).

Circuit's decision in this case on the question "whether the government may make derivative use of information it obtains in violation of a non-constitutional, common-law testimonial privilege." No square conflict exists. None of the five assertedly conflicting cases cited by petitioners involves the psychotherapist-patient privilege. Two of the cases concern the attorney-client privilege, which the court of appeals distinguished, and neither of those cases actually suppressed evidence derived from a violation of that privilege. The remaining cases do not involve any "violation of a * * * privilege" at all; they instead concern the scope of the immunity that must be provided when witnesses invoke a privilege in judicial proceedings, a circumstance that the court of appeals here viewed as distinguishable.

Petitioners rely on two cases involving claims that the government prosecuted a defendant based on information derived from a violation of the attorney-client privilege. See *United States* v. *White*, 970 F.2d 328 (7th Cir. 1992); *United States* v. *Schwimmer*, 892 F.2d 237, 245 (2d Cir. 1989), cert. denied, 502 U.S. 810 (1991). Neither case squarely held that all evidence derived from a violation of the attorney-client privilege must be suppressed. In *White*, the court of appeals determined that the government had *not* introduced evidence at trial that "stem[med] directly or indirectly" from evidence obtained in violation of the attorney-client privilege; accordingly, the court concluded that it "need not determine whether due process is implicated" by the government's use of such information. 970 F.2d at 336. In *Schwimmer*, the court of appeals remanded the case to the district court to determine whether the government had introduced evidence derived from a violation of the attorney-client privilege and, if so, "whether a substantial right of the [defendant] was affected," thereby leaving open the possibility that the use of such evidence would not invalidate the prosecution. 892 F.2d at 245.

Moreover, the court in *Schwimmer* characterized the attorney-client privilege as serving constitutional values, which distinguishes it from other types of evidentiary privileges, including the psychotherapist-patient privilege involved in this case. See 892 F.2d at 243 (noting that the attorney-client privilege "provides essential support for the constitutional right to the assistance of counsel"). And the court of appeals here distinguished its decision in this case from the scenario in *White* on the basis that *White* involved the attorney-client privilege. Pet. App. 27a n.8. The court explained that, "[e]ven assuming that suppression of derivative evidence may, under extraordinary circumstances, be required in cases involving the attorney-client privilege, such an extreme remedy is not required in this case." *Ibid.*

Petitioners also rely on cases that hold that a witness's assertion of the privilege against adverse spousal testimony may be overcome if the government promises the spouse immunity from direct and derivative use of the testimony. See *In re Grand Jury*, 111 F.3d 1083, 1088 (3d Cir. 1997); *In re Grand Jury Subpoena of Ford*, 756 F.2d 249, 252 (2d Cir. 1985); see also *In re Grand Jury Matter*, 673 F.2d 688 (3d Cir.) (a witness could not be compelled to give testimony over a claim of that privilege where the government declined to provide derivative use immunity to the spouse), cert. denied, 459 U.S. 1015 (1982). Those cases are unlike this one because neither petitioners nor the therapists were compelled to testify about privileged conversations. No issue arose in this case as to the scope of any immunity that would have to be granted in such circumstances. Indeed, the court of appeals cited such cases approvingly in "agree[ing]" with petitioners that "*Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege." Pet. App. 25a.[11]

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[11] In *Kastigar*, the Court upheld the constitutionality of the use immunity statute, 18 U.S.C. 6001 *et seq.*, which permits the government to

Petitioners suggest (Pet. 12 n.2) that the court of appeals drew "a distinction without a difference" between this case and cases involving grants of immunity. But the fact remains that petitioners cite no decision that squarely places a bar on derivative use of the contents of a communication covered by a non-constitutional privilege absent an order compelling testimony. And there is no reason to conclude that, in a case in which the government seeks to compel testimony from a witness invoking such a privilege, the Fourth Circuit would reach a result contrary to the Second and Third Circuits.[12]

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obtain a court order compelling testimony from a witness who invokes the Fifth Amendment privilege against self-incrimination, provided that "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case." 406 U.S. at 448-449 (quoting 18 U.S.C. 6002). The Court reasoned that, because the statute provides a witness with "immunity * * * coextensive with the privilege" against self-incrimination, the statute "suffices to supplant" the privilege. *Id.* at 462. The Court observed that the government would bear the burden of proving that all evidence proposed for use in any subsequent criminal prosecution of the witness was derived from sources independent of his compelled testimony. *Id.* at 461-462. *Kastigar*, in contrast to this case, involved a constitutional privilege; *Kastigar* is also distinguishable in that it arose in the context of whether, or in what circumstances, a witness's testimony could be compelled.

[12] There are significant differences between this case and the compelled testimony cases. Where a witness invokes a privilege against testifying in a judicial proceeding, the grant of immunity serves to extinguish the witness's right to refuse to testify. See *Grand Jury*, 111 F.3d at 1087 (noting that such a grant of immunity "nullifies any claim of privilege"). But Squillacote's right to assert a privilege has not been extinguished. Moreover, in circumstances where the government must choose whether to provide direct and derivative use immunity in order to obtain a witness's testimony, the government's attorneys are able to assess, at a time when the applicability of the privilege has been recognized, whether the benefits of obtaining the testimony in the present proceeding outweigh the costs (*e.g.*, the inability to use the testimony against the witness or the

c. The question that petitioners present for the Court's review has a somewhat hypothetical quality. There is no reason to conclude that the government has, as petitioners assert (Pet. 13), "use[d] the information contained in [privileged communications] to build a criminal prosecution."

Petitioners speculate that the FBI's Behavioral Analysis Program Team relied on information gleaned from the two conversations to prepare its report analyzing Squillacote's emotional vulnerabilities. But the record undercuts such speculation. Both conversations were relatively brief and undetailed. See Pet. App. 119a-128a. The government acquired essentially identical information from FISA-authorized interceptions of unquestionably non-privileged conversations between Squillacote and her friends or family members.[13] The two government agents who contemporaneously learned the contents of the conversations—the analyst who transcribed the conversations and a supervisor—both declared in sworn affidavits that the conversations were not used in preparing the Behavioral Analysis Program report.[14]

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spouse in another proceeding). The government is not in a similar position where, as here, its investigators come upon possibly privileged material during an investigation.

[13] In the first conversation, Squillacote informed the therapist of a family history of depression, inquired about medications for depression, and was referred to a psychopharmacologist. Pet. App. 125a-128a. In the second conversation, the therapist told Stand that Squillacote was depressed and did not feel safe with herself, that she had been started on an antidepressant medication, and that Stand should watch over her until the medication became effective. *Id.* at 119a-124a. Squillacote discussed the same subjects in many recorded telephone calls with friends and relatives that were unquestionably non-privileged. See Gov't C.A. Br. 93 & n.41 (citing examples from the record of conversations in which Squillacote discussed, among other things, her depression, psychiatric vulnerability, therapy, and treatment with antidepressants).

[14] Specifically, the FBI agent who supervised the surveillance attested that "[n]o information from the two telephone calls" with the therapists "was provided to the individuals who worked on and wrote the [BAP

Thus, even if the question presented by petitioners —whether the government "is entitled to make derivative use of [privileged] communications" (Pet. (I))—otherwise warranted review, such consideration should await a case in which there is reason to believe that the government actually did so. Here, even if the Court were to hold that the government could not make derivative use of privileged psychotherapist-patient communications and remand the case for the *Kastigar*-type hearing that petitioners have sought, there is little, if any, prospect that petitioners would ultimately be entitled to any relief.

2. Petitioners next contend (Pet. 14-21) that the court of appeals erred in sustaining the jury instruction on the term "relating to the national defense." The court of appeals' decision is consistent with this Court's decision in *Gorin* v. *United States*, 312 U.S. 19 (1941), and does not conflict with any decision of any other court of appeals. Petitioners' challenge merits no further review.

The espionage statutes under which petitioners were convicted prohibit an individual from obtaining, taking, or copying documents "connected with the national defense," 18 U.S.C. 793(b), or from transmitting, conspiring to transmit, or attempting to transmit documents or information "relating to the national defense," 18 U.S.C. 794(a) and (c), where such activity is engaged in "with intent or reason to believe that [the information] is to be used to the injury of the United States or to the advantage of a foreign nation."

At trial, petitioners presented evidence that some, but far from all, of the information in the documents that Squillacote took from the Department of Defense, and subsequently

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report]." J.A. 354. The FBI agent who listened to and transcribed the conversations attested that his only role with respect to that report was filling out a personality assessment test on Squillacote and that "[n]othing that [he] learned in either telephone conversation * * * affected [his] answers." J.A. 357.

turned over to the undercover agent, was similar to information available to the public in, for example, newspapers or trade publications.[15] Petitioners argued that, if the information in the documents was in the public domain, the documents were not "relat[ed] to the national defense" or "connected with the national defense." Pet. App. 58a. To that end, petitioners' proffered a jury instruction that stated, in pertinent part, that those terms apply only to "information relating to our national defense which is not available to the public at the time of the claimed violation," and thus not to information that "is lawfully accessible to anyone willing to take pains to find, to sift, and to collate it." J.A. 1645.

The district court refused to give petitioners' proffered instruction. Instead, over petitioners' objection, the court gave the following instruction:

> The term "national defense" is a broad term which refers to the United States military and naval establishments and to all related activities of national preparedness.
>
> To prove that documents, writings, photographs or information relate to the national defense, there are two things that the Government must prove. First, it must prove that the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States.
>
> And second, it must prove that the material is closely held by the United States government.

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[15] Contrary to petitioners' suggestion (Pet. 19), the record demonstrates only that "snippets" of information contained in the documents were available to the public. Pet. App. 58a; see J.A. 1362 (district court finds that "there is no evidence in this case that all of the information that was put out here was in the public domain"); Gov't C.A. Br. 65 n.26.

> Where the information has been made public by the United States government and is found in sources * * * lawfully available to the general public, it does not relate to the national defense.
>
> Similarly, where sources of information are lawfully available to the public and the United States government has made no effort to guard such information, the information itself does not relate to the national defense.

J.A. 1434-1435. The court of appeals subsequently approved that instruction. Pet. App. 57a-66a.

Petitioners contend (Pet. 15-16) that the jury instruction improperly expanded the definition of "national defense" information to include information that is "freely available to the public." They argue that the district court thereby "stripped petitioners of their ability to present th[e] defense" that the information for which they were prosecuted was available from public sources.

Contrary to petitioners' assertions, the jury instruction is not "inconsistent with this Court's case law." Pet. 14 (capitalization omitted). This Court has never held that information in classified government documents ceases to "relat[e] to the national defense," within the meaning of the espionage statutes, whenever such information may be found somewhere in the public domain. Nor has any court of appeals made such a holding. And, in any event, because the jury was required to find that "disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States," petitioners were not deprived of the opportunity to defend on the ground that the material could not have that effect because it was already publicly available.

a. Petitioners purport to find support for their position in a single sentence in this Court's decision in *Gorin*. See Pet. 16-17. But petitioners read too much into that sentence.

In *Gorin*, the Court considered the construction and constitutionality of Sections 1 and 2 of the Espionage Act of June 15, 1917, ch. 30, 40 Stat. 217-219, which contain nearly identical language to that in Sections 793 and 794. The Court defined the statutory term "national defense" as a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." 312 U.S. at 28 (internal quotation marks omitted). In concluding that such a definition was not unconstitutionally vague, the Court noted the "obvious delimiting words in the statute * * * requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'" *Id.* at 27-28. The Court explained that such language establishes a scienter element, which "requires those prosecuted to have acted in bad faith." *Id.* at 28. In light of the scienter requirement, the Court concluded that the statutory language was "sufficiently definite to apprise the public of prohibited activities" and "consonant with due process." *Ibid.*[16]

In the course of holding that the scienter requirement defeated a vagueness challenge to the espionage statutes, the *Gorin* Court observed: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." 312 U.S. at 28. It is that sentence upon which petitioners seize in claiming that the jury instruction is inconsistent with this Court's case law. They construe that sentence as holding that "'[w]hen there is no occasion for secrecy' * * * the

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[16] Petitioners do not dispute that the district court properly charged the jury on the scienter element of Sections 793 and 794. See J.A. 1430-1433, 1436, 1438-1439, 1442-1443.

'information' at issue cannot give rise to espionage." Pet. 16 (quoting *Gorin*, 312 U.S. at 28).

But that is not what the Court said. Rather, the Court stated that the separate scienter element of the espionage statutes "in all likelihood" would not be satisfied if the information had previously been published by the United States government; in other words, the defendant probably could not be found to have acted with the requisite "intent or reason to believe that the information * * * [was] to be used to the injury of the United States, or to the advantage of any foreign nation" if the United States had already published the information. *Gorin*, 312 U.S. at 27-28. The Court did not even suggest, let alone hold, that the information would automatically cease in those circumstances to satisfy the "relating to the national defense" element of the offense. Much less did the Court address the character of information that had *not* been "published by authority of Congress or the military departments," but that had instead reached the public domain by unofficial (and perhaps unauthorized) channels. *Gorin* is thus of no assistance to petitioners.

b. Petitioners also rely on one court of appeals decision, *United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946), to support their position that the espionage statutes have no application to publicly available information. See Pet. 17. But that case involved material quite different from the material here.

In *Heine*, the defendant, in 1940 and 1941, provided a German company with reports about the aviation industry in the United States. Unlike petitioners, the defendant did not obtain or transmit closely held government documents. Rather, the defendant merely "condensed and arranged" information that "came from sources that were lawfully accessible to anyone who was willing to take the pains to find, sift and collate it," including "ordinary magazines, books

and newspapers," "technical catalogues, handbooks and journals," communications with airplane manufacturers and their employees, and "exhibits, and talks with attendants, at the World's Fair." 151 F.2d at 815. The court noted that "no public authorities, naval, military or other, had ordered, or indeed suggested, that the manufacturers of airplanes—even including those made for the services—should withhold any facts which they were personally willing to give out." *Ibid.*[17]

The Second Circuit reasoned that, just as the espionage statutes are not violated by the dissemination of "information about weapons and munitions of war which the [U.S. armed] services had themselves made public," the espionage statutes are not violated by the dissemination of "information which the services have never thought it necessary to withhold at all." *Heine*, 151 F.2d at 816; see also *ibid.* ("[t]he services must be trusted to determine what information may be broadcast without prejudice to the 'national defense,' and their consent to its dissemination is as much evidenced by what they do not seek to suppress, as by what they utter"). Thus, in stating that the defendant in *Heine* could not be convicted under the espionage statutes for providing the German company with information that had "once been made public, and ha[d] thus become available in one way or another to any foreign government," *id.* at 817, the Second Circuit simply meant that a defendant does not violate those statutes merely by condensing, arranging, and disseminating information that he has lawfully obtained from public sources. The Second Circuit did not hold, as petitioners suggest, that a closely held government document ceases to

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[17] *Heine* thus involved the sort of information that, under the district court's jury instruction in this case, would not "relate to the national defense" under the espionage statutes. It was a case "where sources of information are lawfully available to the public and the United States government has made no effort to guard such information." J.A. 1435.

"relate to the national defense," for purposes of the espionage statutes, whenever the information in the document may be found in the public domain.

As the court of appeals recognized (Pet. App. 63a), a case such as *Heine*, which involved the dissemination of information that is not obtained from, or attributed to, government sources, is quite different from a case such as this one, which involved the dissemination of classified government documents. The court of appeals explained that "there is a special significance to our government's own official estimates of its strengths and weaknesses, or those of a potential enemy," because such estimates "carry with them the government's implicit stamp of correctness," which "in and of itself is a fact that would be highly valuable to other countries." *Ibid.* The Second Circuit itself has recognized the distinction between the dissemination of publicly available information, as in *Heine*, and the dissemination of classified government information. See *United States* v. *Soblen*, 301 F.2d 236, 239 ("[t]he fact that the source of the information was classified as secret distinguishes this case from United States v. Heine"), cert. denied, 370 U.S. 944 (1962).[18]

c. The court of appeals' affirmance of the district court's jury instruction does not, as petitioners suggest (Pet. 18), mean that "the public availability of information [is] irrelevant" in an espionage prosecution involving government documents. As noted above, this Court recognized in *Gorin*

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[18] Petitioners suggest (Pet. 18) that the Fourth Circuit's decision in this case conflicts with its decisions in *United States* v. *Morison*, 844 F.2d 1057, 1071-1072, cert. denied, 488 U.S. 908 (1988), and *United States* v. *Truong*, 629 F.2d 908, 918 n.9 (1980), cert. denied, 454 U.S. 1144 (1982). But the court of appeals reconciled its decision in this case with those prior decisions. See Pet. App. 64a-65a. And, even assuming *arguendo* that any tension exists between this case and either *Morison* or *Truong*, that tension would properly be resolved by the Fourth Circuit, not by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

that the public availability of information may be relevant to whether the defendant disseminated the information with the intent to damage the United States or to assist a foreign power. See 312 U.S. at 28.

Here, moreover, the district court instructed the jury that, "[t]o prove that documents, writings, photographs or information relate to the national defense," the government must prove, *inter alia*, that "the disclosure of the material would be potentially damaging to the United States or might be useful to an enemy of the United States." J.A. 1435. Such an instruction permits a defendant to argue that, because the material at issue is already in the public domain, its further dissemination could be of no appreciable harm to the United States or benefit to a foreign power.[19]

Finally, if the government had to bear the burden of proving that the information on which an espionage prosecution is based "was not lawfully available in the public domain" at the time of its dissemination, as petitioners urge (Pet. 15 (emphasis omitted)), the government's ability to bring such prosecutions would be severely impaired. The government would effectively be required "to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information." Pet. App. 64a. As the court of appeals recognized, "[r]equiring that kind of 'proof of a negative' would unduly hamper the government's ability

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[19] Petitioners also err in suggesting (Pet. 21) that the court of appeals held, "as a matter of law," that the dissemination of government documents falls within the prohibitions of the espionage statutes. Petitioners' argument ignores key portions of the instructions given by the district court and affirmed by the court of appeals, including that the jury must find that the information was "closely held" by the United States, that the information was "potentially damaging" to the United States or "useful to an enemy of the United States," and that the defendants disseminated the information with the intent to harm the United States or to assist a foreign power. See J.A. 1430-1443.

to protect sensitive information and would render successful prosecutions in cases involving closely-held documents nearly impossible." *Ibid.* No court has suggested that the government must bear such a burden.

3. a. Petitioners contend (Pet. 22-25) that the FISA applications and related materials should have been disclosed to them. They are mistaken.

Under FISA, the government may obtain a court order authorizing electronic surveillance or a physical search of an "agent of a foreign power." To obtain such authorization, a federal officer, after receiving the Attorney General's approval, must submit an application to one of seven district judges appointed by the Chief Justice to serve on the Foreign Intelligence Surveillance Court. 50 U.S.C. 1804(a), 1823(a); see also 50 U.S.C. 1803(a). The application must contain, among other things, the identity of the target; a statement of the reasons to believe that the target is an agent of a foreign power; a statement of the procedures to be employed to minimize the acquisition and retention of nonpublic information; and a certification from a high-level Executive Branch official that the official "deems the information sought to be foreign intelligence information" that "cannot reasonably be obtained by normal investigative techniques." 50 U.S.C. 1804(a), 1823(a).

A judge of the Foreign Intelligence Surveillance Court may enter an order authorizing electronic surveillance or a physical search after making specific findings that, *inter alia*, there is probable cause to believe that the target is an agent of a foreign power, the proposed minimization procedures are proper, and the application contains all the required certifications. If the target is a United States person, the judge must also find that the certifications are not "clearly erroneous" on the basis of the information before the judge. 50 U.S.C. 1805(a), 1824(a).

In the event that the government attempts to use evidence derived from a FISA warrant in a criminal proceeding, the "aggrieved person" against whom the evidence is offered may move to suppress the evidence on the ground that the evidence was "unlawfully acquired" or that the surveillance or search "was not made in conformity with an order of authorization or approval." 50 U.S.C. 1806(e), 1825(f). In adjudicating the motion to suppress, the district court must review the FISA application and related materials "in camera and ex parte" if the Attorney General files an affidavit stating that "disclosure or an adversary hearing would harm the national security of the United States." 50 U.S.C. 1806(f), 1825(g). The court may disclose portions of the FISA application materials, under appropriate protective procedures, only if disclosure is "necessary to make an accurate determination of the legality of the surveillance." 50 U.S.C. 1806(f), 1825(g).

Petitioners suggest that the FISA provisions authorizing ex parte and in camera review are improper because, in virtually all other warrant circumstances, the government's application for a warrant must be disclosed to the defendant for purposes of adjudicating the legality of the surveillance. That view disregards the sensitive national security interests involved in foreign intelligence surveillance, which require the adoption of different procedures for the protection of individual privacy. As the District of Columbia Circuit has observed, "[i]n FISA the privacy rights of individuals are ensured not through mandatory disclosure, but through its provisions for in-depth oversight of FISA surveillance by all three branches of government and by a statutory scheme that to a large degree centers on an expanded conception of minimization that differs from that which governs law-enforcement surveillance." *United States* v. *Belfield*, 692 F.2d 141, 148 (1982); see *United States* v. *United States Dist. Court*, 407 U.S. 297, 317 (1972) (com-

menting, in ruling on the authority of the government to conduct electronic surveillance in internal security matters, that constitutional rights are best preserved "through a separation of powers and division of functions among the different branches and levels of Government"). In that way, FISA "reconcile[s] national intelligence and counterintelligence needs with constitutional principles in a way that is consistent with both national security and individual rights." S. Rep. No. 701, 95th Cong., 2d Sess. 16 (1978). Thus, "all courts that have considered the constitutionality of such an *in camera, ex parte* examination have held such examinations proper." *United States* v. *Isa*, 923 F.2d 1300, 1307 n.8 (8th Cir. 1991) (citing cases); *United States* v. *Ott*, 827 F.2d 473, 476-477 (9th Cir. 1987) (no due process violation); *United States* v. *Duggan*, 743 F.2d 59, 74 (2d Cir. 1984) (no Fourth Amendment violation); see *Taglianetti* v. *United States*, 394 U.S. 316, 317 (1969) (per curiam) (adversary proceedings and full disclosure were not necessarily required "for resolution of every issue raised by an electronic surveillance").

Petitioners contend (Pet. 24) that the lower courts had "no legitimate justification" to deny petitioners access to the FISA application materials. They are wrong. The Attorney General filed an affidavit explicitly stating that disclosure of the FISA application materials would harm the national security of the United States. See Pet. App. 14a. The affidavit provided ample justification for the refusal to disclose the materials. See 50 U.S.C. 1806(f).

Petitioners further contend (Pet. 24-25) that the FISA application materials should have been disclosed because petitioners allegedly raised serious questions about the lawfulness of the surveillance and the accuracy of the government's representations. The record does not support petitioners' claim. The district court specifically acknowledged that disclosure would be appropriate if its initial review of the materials revealed "potential irregularities" including

"indications of possible misrepresentation of fact." J.A. 308 (quoting S. Rep. No. 701, *supra*, at 64). The district court found, "after review," that there was "no basis for discovery or an adversary hearing." *Ibid.* The court of appeals came to the same conclusion. It refused to disclose the materials because "the documents submitted by the government were sufficient for the district court and this Court to determine the legality of the surveillance." Pet. App. 15a. In conducting an ex parte and in camera review of the FISA application materials, the courts here acted "in keeping with the procedures contemplated by Congress when it enacted FISA." *Belfield*, 692 F.2d at 147. FISA "clearly anticipates that an *ex parte, in camera* determination is to be the rule," and "[d]isclosure and an adversary hearing are the exception, occurring *only* when necessary." *Ibid.* Accordingly, there is no basis for further review of the lower courts' considered determinations on that sensitive and fact-specific question.

b. Petitioners ask this Court to review whether each of the FISA applications established probable cause to believe that petitioners were agents of a foreign power at the time that the application was made. See Pet. 25-29. As petitioners concede (Pet. 25), reviewing determinations of probable cause is a fact-specific inquiry. That inquiry has already been conducted several times over in this case.

As the district court observed, "[e]ach FISA application in this case was expressly certified by Attorney General Reno or Acting Attorney General Gorelick as satisfying the criteria and requirements of the FISA statute," and "the surveillance and searches were authorized by eight FISA Court Judges who determined that the government's applications met all the requirements of the FISA statute, including that there was probable cause that the targets were 'agents of a foreign power.'" J.A. 305-306; see also J.A. 292 ("Eight different judges of the FISA Court determined

that the applications satisfied the requirements and criteria of FISA, including a specific finding that the targets were the agents of a then-existing foreign power."). Moreover, on petitioners' motion to suppress evidence, the district court reviewed each application and found that all of the requirements of FISA were satisfied. J.A. 306. On appeal, three additional federal judges "reviewed *de novo* the relevant materials, and likewise conclude[d] that each FISA application established probable cause to believe that [petitioners] were agents of a foreign power at the time the applications were granted." Pet. App. 14a.[20] Particularly given that not one judge has expressed any doubts about the sufficiency of the probable cause showing in this case, no further review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001

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[20] The court of appeals declined to elaborate further in the interests of national security. Pet. App. 14a-15a. We adopt the same course.

S.
MAR 27 2001
CLERK

No. 00-969

In the Supreme Court of the United States

THERESA MARIE SQUILLACOTE AND KURT ALAN STAND,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In opposing petitioners' request for review of the question whether the government is permitted to make derivative use of information protected by a non-constitutional, common law privilege, the government implicitly concedes that a conflict exists, but insists that it is not a sufficiently "square" one to warrant this Court's review. The government's effort to blur the conflict is unavailing. This important question of federal law has deeply divided the circuits and is plainly ripe for determination by this Court. In addition, the government's half-hearted defense of the court of appeals' construction of the espionage laws underscores the need for this Court to make clear that information *may* not "relat[e] to the national defense" if that same information has been made public by non-governmental sources, and that the question of whether such publicly available information is the "same" as disseminated classified information is a question for the jury, not the court. Finally, the government's mantra that several federal judges already have reviewed the sufficiency of the FISA applications *ex parte* does not relieve this Court of its obligation to conduct its own review, where petitioners have been denied any meaningful opportunity to challenge the FISA authorizations and the voluminous record in this case is bereft of any evidence that petitioners were agents of an existing foreign power at the time of the initial FISA authorization.

1. a. The court of appeals, sustaining the trial court, held that petitioner Squillacote was not entitled to an evidentiary hearing at which the government would have to shoulder the "heavy burden" of establishing that its evidence had not been derived from the privileged psychotherapist-patient communications it concededly intercepted in this case. In the court's view, "suppression of any evidence derived from the privileged conversations" would be improper because "the privilege is a testimonial or evidentiary one, and not

constitutionally based." Pet. App. 26a. As we explained in the petition (Pet. 10-12), the circuits are deeply divided on the question whether the government is free to make derivative use of information it obtains in violation of such non-constitutional testimonial privileges.

The government challenges that contention (Opp. 13-16), but its efforts to distinguish case law from the Second, Third, and Seventh Circuits are largely makeweight. With respect to the Second and Seventh Circuit cases involving the attorney-client privilege, the government merely observes that the attorney-client privilege, in contrast to the psychotherapist-patient privilege, "serv[es] constitutional values" (Opp. 15) (citing *United States* v. *Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). But that is beside the point. Whatever penumbra-like "constitutional values" the government now finds in the attorney-client privilege, the fact is that this privilege, like the psychotherapist-patient privilege, is merely an "evidentiary" protection; it is not constitutionally ordained. See 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961). Indeed, the Second Circuit in *Schwimmer* made that very point in a passage immediately preceding the one quoted by the government in its opposition. See 892 F.2d at 243 ("[T]he rule affording confidentiality to communications between attorney and client endures as the oldest rule of privilege known to the common law."). There is no suggestion that the Second Circuit ruled as it did in *Schwimmer* because it regarded the attorney-client privilege as "constitutionally based." And the Seventh Circuit in *United States* v. *White*, 970 F.2d 328 (7th Cir. 1992), expressly recognized the attorney-client privilege as "a testimonial privilege without constitutional footing." *Id.* at 336. Nevertheless, the court stated that "[t]he proper remedy" for a violation of this merely "testimonial" privilege "would be exclusion of derivative evidence at trial." *Id.*

The government contends (Opp. 14), however, that the Second and Seventh Circuit decisions may be overlooked because none of those cases "squarely held that all evidence

derived from a violation of the attorney-client privilege must be suppressed." Perhaps it depends on what the meaning of "squarely" is. In *Schwimmer*, the Second Circuit ordered an extensive hearing on whether the government had obtained derivative evidence from its breach of the attorney-client privilege; the court of appeals ultimately sustained the defendant's conviction, but only because the government managed to carry its burden to "demonstrate that the evidence it use[d] to prosecute [the defendant] was derived from legitimate, independent sources." *United States* v. *Schwimmer*, 924 F.2d 443, 446 (2d Cir. 1991). That, of course, is the very remedy that petitioners sought in this case but were denied because there was no "constitutionally based" right at stake. As for the Seventh Circuit's decision in *White*, it is certainly true, as the government observes (Opp. 15), that "the court of appeals determined that the government had *not* introduced evidence at trial that 'stem[med] directly or indirectly' from evidence obtained in violation of the attorney-client privilege." But why did the Seventh Circuit address such "direct and indirect" use in the first place? It did so because, in its view, "[t]he proper remedy" for the breach even of "a testimonial privilege without constitutional footing" is "exclusion of derivative evidence at trial." 970 F.2d at 336. The Fourth Circuit flatly rejected that very proposition.

As we noted in our petition (Pet. 11-12 (citing cases)), the Fourth Circuit's constitutional/non-constitutional distinction is also in conflict with decisions from the Second and Third Circuits regarding the privilege against adverse spousal testimony. The government does not pretend that this privilege likewise "serv[es] constitutional values" (Opp. 15). Instead, it contends that in the present case, unlike in the spousal privilege line of cases, "neither petitioners nor the therapists were compelled to testify about privileged conversations." Opp. 15. That is truly a distinction in search of a rationale. In the cases involving adverse spousal testimony, the courts have generally held that granting "use-fruits" immunity is "co-extensive" with

the protections of the privilege, and thus required to extinguish the underlying right. See, *e.g.*, *In re Grand Jury Subpoena of Ford* v. *United States*, 756 F.2d 249, 255 (2d Cir. 1985) ("'use-fruits' immunity granted by the government to [the witness] is fully co-extensive with the scope of the privilege against adverse spousal testimony"); *In re Grand Jury Matter*, 673 F.2d 688, 692-94 (3d Cir. 1982) (where the government declined to grant a witness derivative use immunity protecting against the use of the witness's testimony against the spouse, trial court correctly refused to compel testimony over a claim of adverse spousal testimony privilege). Thus, it was not, as the government suggests, the act of compulsion, but rather the scope of the spousal privilege that was dispositive in determining that derivative use may not be made of information obtained in breach of that privilege. Indeed, the Second and Third Circuits just as easily could have concluded that the spousal privilege could be overcome with a promise only to avoid *direct* use of the compelled testimony. Instead, those circuits require such a broad immunity precisely because they believe, unlike the Fourth Circuit, that the violation of merely "testimonial" privileges should be remedied by suppressing derivative evidence.[1]

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[1] The government insists that "there is no reason to conclude" that the Fourth Circuit would not suppress evidence obtained in violation of a non-constitutional privilege "in a case in which the government seeks to compel testimony from a witness invoking such a privilege." Opp. 16. In fact, there is good reason to suspect otherwise. Although the Fourth Circuit suggested that "*Kastigar*-like protections may be required in cases involving testimony compelled over the assertion of a non-constitutional privilege" (Pet. App. 25a), in the very next breath it added that suppression of the evidence in this case would in any event be improper "given that the privilege is a testimonial or evidentiary one, and not constitutionally based." Pet. App. 26a. And in the paragraph concluding this section of its opinion, the court of appeals identified the non-constitutional nature of the underlying privilege as a free-standing reason to sustain the trial court's refusal to suppress evidence derived from the

b. Having failed to distinguish the conflicting authority, the government next contends that the question presented "has a somewhat hypothetical quality" because "[t]here is no reason to conclude that the government has * * * 'use[d] the information contained in [privileged communications] to build a criminal prosecution.'" Opp. 17. But that is both untrue and irrelevant.

First, there is a substantial basis for believing that the FBI's Behavioral Program Team did, indeed, capitalize on its interception of the privileged communications. For one thing, the transcribed conversations, far from being "relatively brief and undetailed" (as the government now suggests (Opp. 17)), were in fact richly revealing of Squillacote's array of psychiatric disabilities — including her current mental condition (the very object of the behavioral profile), her family's medical history, her use of medication, and her suicidal ideations. See JA2173-80. The same FBI employee who intercepted and transcribed these communications (Thomas Chmelovski) was then assigned the job of providing critical information regarding Squillacote's personality characteristics to the BAP team, which crafted the psychological profile based in part on his input. In particular, Chmelovski completed a personality assessment test that was used by a Ph.D. psychologist to identify the psychiatric "vulnerabilities" that could be exploited by the FBI in the sting operation. See JA262-263; JA1173-1174. And Katherine Alleman, the case agent who developed the sting, had also been exposed to the privileged conversations. JA354. What is more, much of the most sensitive information contained in the privileged psychotherapist conversations (*e.g.*, Squillacote's mother's tendency toward depression, Squillacote's medication, and her suicidal ideations) also found their way into the BAP profile

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interception of Squillacote's conversations with her psychotherapists. See Pet. App. 27a.

after first appearing in Chmelovski's transcription of the privileged communications.

And all of that, it need hardly be added, is the record we developed *without* the hearing that would have been granted in the Second, Third, and Seventh Circuits. The government insists that, were we to prevail on the question presented, "there is little, if any, prospect that petitioners would ultimately be entitled to any relief" (Opp. 18); but surely it is a bit too early for the government to declare victory and leave the field. If, as petitioners contend, a defendant whose psychotherapist-patient privilege has been breached is entitled to an evidentiary hearing, the government will be required at that hearing to bear "'the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.'" *United States* v. *Harris*, 973 F.2d 333, 336 (4th Cir. 1992) (quoting *Kastigar* v. *United States*, 406 U.S. 441, 461-62 (1972)). Perhaps the government will ultimately bear that "heavy burden" — although to do so it will not suffice simply to submit a pair of self-serving affidavits by "[t]he two government agents who contemporaneously learned the contents of the conversations" (Opp. 17). See *Harris*, 973 F.2d at 337 ("the government's mere representations" that it did not use privileged material "are generally insufficient to carry its burden"); *United States* v. *Hampton*, 775 F.2d 1479, 1485 (11th Cir. 1985) (same). But petitioners are at least entitled to hold the government to its burden.[2] Because the court of appeals believed — in accord with the Ninth and Tenth Circuits, but in conflict with the Second, Third, and Seventh Circuits — that the breach of a non-constitutional privilege does not prevent the government from making derivative use of any information it obtains, it declined even to grant petitioners a hearing. That decision is wrong and warrants further review.

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[2] The government's derivative use of these communications prejudiced Stand as well given petitioners' uniform defense at trial.

2. The government asserts that petitioners' proposed "national defense" instruction would have required the prosecution "'to prove, at least as to some piece of information contained in the document, that no person anywhere in the world had ever publicly speculated about that information.'" Opp. 25 (quoting Pet. App. 64a). Petitioners' proposed instruction, however, imposed no such burden. On the contrary, the proposed instruction — taken directly from 1 Sand, Siefert, Loughlin & Reis, MODERN FEDERAL CRIMINAL JURY INSTRUCTIONS (CRIMINAL) ¶ 29.01 (1997) — would have called upon the jury simply to consider whether, based upon all of the evidence, the disclosed information was "available to the public at the time of the claimed violation." See Pet. App. 57a (quoting JA1645). Such an instruction would have permitted the government to argue to the jury that information appearing in trade publications is inherently different from similar or identical information in classified government documents because the latter "carry with them the government's implicit stamp of correctness." Pet. App. 63a. And that instruction would have had the advantage — contrary to the jury instruction given in this case — of being faithful to this Court's holding in *Gorin* v. *United States*, 312 U.S. 19 (1941), that the espionage statutes do not prohibit the dissemination of information "[w]here there is no occasion for secrecy." *Id.* at 28. At the government's urging, however, the court of appeals disavowed *Gorin*'s fundamental teaching and held, as a matter of law, that the public availability of information — at least where the information has been made public by sources other than the government — is irrelevant to whether the information "relat[es] to the national defense" within the meaning of the espionage laws. Pet. App. 63a.

Notably, by holding that information contained in "an official document closely held by the government" is never equivalent to the same information in public sources (*id.*), the Fourth Circuit effectively converted the espionage statutes into a flat prohibition on disseminating *classified* documents to a

foreign power. Absent evidence that the government has voluntarily released a piece of classified information at some other time prior to disclosure, the practical effect of the court of appeals' holding is that, as a matter of law, any classified document "relates to the national defense." But that plainly contravenes the plain language of the statute, which speaks of "information relating to the national defense," not "classified information." Compare 18 U.S.C. § 794(a), with 18 U.S.C. § 798(a) (unlawful to "transmit[]" certain types of "classified information").

What is more, the Fourth Circuit's gloss on the "national defense" element of the espionage statutes ignores the internal regulations governing the Department of Defense, which require the government to evaluate whether information should remain classified after such information "[a]ppear[s] in the public domain." 32 C.F.R. § 159a.15(j). As the government's own expert, Admiral Dennis C. Blair, conceded at trial, the declassification review for open publication is triggered whether or not the government was the source of the public disclosure of information. Tr. at 714-15. Moreover, as that same expert acknowledged, information that should be declassified on account of widespread public availability can, and often does, remain classified as a result of bureaucratic inaction. Tr. at 729-30. Thus, while it is undisputed that information may be improperly classified at any given time on the basis of "open publication" by sources other than the government, under the Fourth Circuit's reading of the law a jury may not even consider such "open publication" in determining whether the espionage statutes cover such information.[3] Such

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[3] The government argues that the trial court's instruction in this case did permit the jury to take account of publicly available information from non-governmental sources since it required the government to prove that the disclosure was "potentially damaging to the United States or might be useful to an enemy of the United States." (Opp. 25 (quoting JA1435)). Such a claim is disingenuous, at best, since the government took the extraordinary step at trial of submitting a

a reading cannot be squared with *Gorin* or the plain language of the espionage laws.

3. The government's response to petitioners' FISA challenge mirrors the Kafkaesque nature of the statute itself. "Sure, you can challenge probable cause," the government tells us; "you just can't look at the affidavits that purport to establish it." "Sure, there must be sufficient evidence that petitioners were 'agents of a foreign power' at the time the FISA authority was granted — but you have to take our word for that." "And after all," the government concludes, "'eight FISA Court Judges,' backed by the district court and the court of appeals, all agreed that we met our burden — even though not one of them heard an opposing point of view from the defense."

In America, this Court sits to accord both sides of a dispute the opportunity to be heard. Particularly when the stakes are this large, and the risks of error so substantial, this Court should review the FISA applications — which have been tendered to the Court — to ensure that an appropriate legal standard was used (both for determining the need for disclosure and the elements of agency under FISA), and that probable cause was established. Perhaps the requisite probable cause showing was made, though the marvel of it is that nowhere — not in a 100-page search warrant affidavit, in 550 days of surveillance tapes, or in two full weeks of trial — did the government string together even two sentences (much less probable cause) of an agency relationship with Russia (the only plausible contender).[4]

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revised jury instruction on this element (ultimately adopted by the trial court) for the express purpose of foreclosing jury consideration of such evidence. See JA1534. And the trial court plainly understood its instruction as precluding any defense based upon information placed in the public domain by sources other than the government. See JA2398.

[4] Specifically, there is not a stitch of evidence in the thousands of pages of surveillance transcripts and investigative materials that

Further review is essential to the vindication of petitioners' basic constitutional rights.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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petitioners *knowingly* conspired with or aided and abetted any other person (whether it be alleged co-conspirator James Clark, their alleged East German "handler" Lothar Ziemer, or anyone else) with the specific intent to engage in *clandestine intelligence gathering activities* on behalf of Russia. See JA009 (item # 53 at 7 n.4, 8 n.5) (government relied on "clandestine intelligence gathering" and "conspiracy" and "aiding and abetting" provisions (50 U.S.C. §§ 1801(b)(2)(A) and (E)) in obtaining authorization under FISA). Indeed, the record (including classified material) is so utterly devoid of evidence suggesting any agency relationship between petitioners and Russia at the time of the original FISA authorization that if this case does not warrant disclosure of the underlying affidavits (see 50 U.S.C. §§ 1806(f), 1825(g)), no case ever will.